LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
AUG 8 1975
MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

NO. 75-209

ROY C. WILLIAMS,
Petitioner,

v.

BRASEA, INC., VESSEL CIAPESC I, her engines, etc.,
BENDER WELDING & MACHINE COMPANY, INC.,
and CONSTRUCTION MACHINERY COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

J. ROBERT MCKISSICK
WILLIAM R. EDWARDS
LAW OFFICES OF WILLIAM R. EDWARDS
P. O. Drawer 480
Corpus Christi, Texas 78403

CLEVELAND & SHAABER
Barnett First National Bank
Jacksonville, Florida

Attorneys for Petitioner

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

SUBJECT INDEX

Page

Table of Authorities ....

Opinions Below 1

Jurisdiction 2

Questions Presented for Review—

I. *Should a seaman's claims against the vessel and its owner for injuries occurring at sea as a result of an unseaworthy condition be determined by application of the general maritime law rather than the theory of strict product liability* 2

II. *Is a seaman's claim against manufacturers and sellers of defective ship's equipment for injuries occurring at sea beyond the territorial jurisdiction of any state, determined by the general maritime law as it incorporates Section 402A of the Restatement (Second) of Torts rather than by concepts of strict product liability alone, that are neither uniformly recognized nor applied within the several states, and many of which are contrary to existing standards of admiralty law* .. 2

III. *The District Court held that a fellow crew member was negligent in turning on the power to a cathead without making any reasonable effort to ascertain whether the master was out of danger, although he knew the master was untangling a line on the cathead with his hands at the time. The Court of Appeals held this finding to be clearly erroneous in the absence of an additional finding that the master did not order the power turned on. Does the Jones Act permit a distinction to be made between masters and crew members of a shrimp trawler so that in addition to proving that the fellow crewman failed to use reasonable care which was a proximate cause of his injuries, the master also has the burden of proving and obtaining a separate finding that he did not give an instruction to turn on the winch even though the District Court, in that portion of its findings of fact and conclusions of law dealing with the master's comparative fault, stated that it was not prepared to find that such an instruction was given* 3

Statutes Involved 3

Statement of the Case 3

Page

Reasons for Granting the Writ—

I. *The denial of Petitioner's unseaworthiness claims solely by application of common law negligence concepts and without regard to the general maritime law is in conflict with applicable decisions of this Court and so far departs from the accepted and usual course of judicial proceedings in admiralty as to call for an exercise of this Court's power of supervision* 9

II. *In failing to apply the general maritime law to Petitioner's claims against Bender and CMC for injuries occurring at sea outside of state territorial jurisdiction, the Court of Appeals has decided a question of federal maritime tort law in a manner that conflicts with applicable decisions of this Court and other Courts of Appeal* 14

III. *In holding that the District Court was clearly erroneous in concluding that Terry was negligent in turning on the power to the winch, the decision of the Court of Appeals is in conflict with decisions of other circuit Courts of Appeal, decisions of this Court and its own prior decision* 29

Summary 35

Conclusion 37

Appendix A—District Court's Memorandum and Order 39

Appendix B—District Court's Amended Final Decree 53

Appendix C—Opinion of the Court of Appeals 56

Appendix D—Opinion of the Court of Appeals on Motion for Rehearing 79

Appendix E—Text of Art. III, §2, U.S. Const., 28 U.S.C., §1333 and 46 U.S.C., §688 83

Appendix F—Text of Rule 9(h) and Rule 52(a), Federal Rules of Civil Procedure 85

Appendix G—Text of RESTATEMENT (SECOND) OF TORTS, §402A and comments *b, g, i* and *n* 87

Appendix H—Plaintiff's Ex. 3—photograph of winch and whipline 91

Appendix I—Plaintiff's Ex. 5—photograph of winch and whipline 92

Appendix J—Plaintiff's Ex. 10—photograph of winch and whipline 93

TABLE OF AUTHORITIES

CASES

Page

Alamo Chemical Transportation Co., In Re, 320 F.Supp. 631 (S.D. Tex. 1970) 16
ARIZONA, The v. Anelich, 298 U.S. 110 (1936) 17, 19, 20
Atlantic Transport Co. v. Imbrovek, 234 U.S. 52 (1914)... 15
Beadie v. Spencer, 298 U.S. 124 (1936) 18
Bexiga v. Havir Mfg. Corp., 290 A.2d 281 (N.J. Sup. 1972) 26
Blumenthal v. United States, 306 F.2d 16 (3rd Cir. 1962).. 30
BOAT DAGNY, Inc. v. Todd, 224 F.2d 208 (1st Cir. 1955) 35
Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, *cert. denied,* ____U.S.____, 95 S.Ct. 127 (1974)...... 23
Brown v. Quick Mix Co., 454 P.2d 205 (Wash. Sup. 1969) 23, 26
Burkhard v. Burkhard, 175 F.2d 593 (10th Cir. 1949)..... 31
Burrus Feed Mills, Inc. v. Reeder, 391 S.W.2d 121 (Tex. Civ. App.—Amarillo 1965, no writ hist.) 24
C. A. Hoover v. O. M. Franklin Serum Co., 444 S.W.2d 596 (Tex. Sup. 1969) 25
Carlisle Packing Co. v. Sandanger, 259 U.S. 255 (1922)... 13
Chelentis v. Luckenbach S.S. Co., Inc., 247 U.S. 372 (1918) 17
China Union Lines, Ltd., v. A. O. Andersen & Co., 364 F. 2d 769, (5th Cir. 1966), *cert. denied,* 386 U.S. 933 (1967), *reh. denied,* 386 U.S. 999 (1967) 31
Container Patents Corp. v. Stant, 143 F.2d 170 (7th Cir. 1944), *cert. denied,* 323 U.S. 734 (1944) 31
Cortes v. Baltimore Insular Line, 287 U.S. 367 (1932).... 19, 32
Cronin v. J. B. E. Olson Corp., 501 P.2d 1153 (Calif. Sup. 1972) 22
Crumady v. The JOACHIM HENDRIK FISSER, 358 U.S. 423 (1959) 11
Davis v. Fox River Tractor Co., ____F.2d____ (10th Cir., No. 74-1392, filed June 10, 1975) 23
Devers v. Mobil Chemical Corp., 488 F.2d 258 (5th Cir. 1973) 26
Dorsey v. Yoder Co., 331 F.Supp. 753 (E.D. Pa. 1971), *aff'd.,* 474 F.2d 1339 (3rd Cir. 1973) 23
Elder v. Crawley Book Machinery Co., 441 F.2d 771 (3rd Cir. 1971) 23
Eshbach v. W. T. Grant's & Co., 481 F.2d 940 (3rd Cir. 1973) 25, 27
Ethicon, Inc. v. Parten, 520 S.W.2d 527 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ granted) 25
Ford v. Harnischfeger Corp., 365 F.Supp. 602 (E.D. Pa. 1973) 23

CASES

Page

Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521 (1957) 18, 33, 35
Freeman v. Gould Special School District, 405 F.2d 1153 (8th Cir. 1969), *cert. denied*, 396 U.S. 843 (1969)...... 30
Glass v. Ford Motor Co., 304 A.2d 562 (N.J. Super. Law Div. 1973) 22
Hartzell Propeller Co., Inc. v. Alexander, 485 S.W.2d 943 (Tex. Civ. App.—Waco 1972, writ ref. n.r.e.) 25
Helene Curtis Industries, Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968) 21
Henderson v. Ford Motor Co., 519 S.W.2d 87 (Tex. Sup. 1974) 24, 26
Jacob v. City of New York, 315 U.S. 752 (1942)........ 18
Jamison v. ENCARNACION, 281 U.S. 635 (1930)....... 32
Johnson v. United States, 333 U.S. 46 (1948) 19, 32
Just v. Chambers, 321 U.S. 383 (1941) 21
Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959) 15
Kernan v. American Dredging Co., 335 U.S. 394 (1958)... 32
Krause v. Sud-Aviation, Societe Nationale de Constructions Aeronautiques, 301 F.Supp. 513 (S.D.N.Y. 1968), *aff'd.*, 413 F.2d 428 (2nd Cir. 1969) 16
Kuisis v. Baldwin-Lima-Hamilton Corp., 319 A.2d 914 (Pa. Sup. 1974) 27
Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968) 27
Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631 (8th Cir. 1972) 16, 19, 20
Luckenbach v. W. J. McCahan Sugar Refining Co., 248 U.S. 139 (1918) 12
Luque v. McLean, 501 P.2d 1163 (Calif. Sup. 1972)...... 23
Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944)........11, 12, 13
Manning v. Jones, 349 F.2d 992 (8th Cir. 1965)......... 30
MARINE SULPHUR QUEEN, In Re, 460 F.2d 89 (2d Cir. 1972) 13
McAllister v. United States, 348 U.S. 19 (1952) 33
McKee v. Brunswick Corp., 354 F.2d 577 (7th Cir. 1965) 16, 19
Messick v. General Motors Corp., 460 F.2d 485 (5th Cir. 1972) 23
Michalic v. Cleveland Tankers, Inc., 364 U.S. 325 (1960).. 12
Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960).....11, 12, 14
Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) 28
Noel v. United Aircraft Corp., 342 F.2d 232 (3rd Cir. 1964) 16
Otis Elevator Co. v. Wood, 436 S.W.2d 324 (Tex. Sup. 1968) 27

CASES — Page

Perez v. Ford Motor Co., 497 F.2d 82 (5th Cir. 1974).... 27
Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953)...... 13
Powell v. E. W. Bliss Co., 346 F.Supp. 819 (W.D. Mich. 1972) 24
Pyatt v. Engel Equipment, Inc., 309 N.E.2d 225 (Ill. Ct. App. 3rd Dist. 1974) 23
Ritter v. Narragansett Elec. Co., 283 A.2d 255 (R.I. Sup. 1971) 27
Rourke v. Garza, 511 S.W.2d 331 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ granted) 24
Ross v. Up-Right, Inc., 402 F.2d 943 (5th Cir. 1968).... 21
Runnings v. Ford Motor Co., 461 F.2d 1145 (9th Cir. 1972) 26
Schaeffer v. Michigan-Ohio Navigation Co., 416 F.2d 217 (6th Cir. 1969) 16
Schulz v. Pennsylvania R.R. Co., 350 U.S. 523 (1956).... 19, 32
Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946)........ 11
Shapiro v. Rubens, 166 F.2d 659 (7th Cir. 1948)......... 31
Shoiler v. Secretary of State of United States, 175 F.2d 402 (7th Cir. 1949) 31
Sieracki v. Seas Shipping Co., 149 F.2d 98 (3rd Cir. 1945), *aff'd.*, 328 U.S. 85 (1946) 10, 16
Simpson Timber Co. v. Parks, 369 F.2d 324 (9th Cir. 1966), *cert. granted, vacated and remanded*, 388 U.S. 459 (1967), *aff'd. in part, remanded in part*, 390 F.2d 353 (9th Cir. 1968) 16
Smith v. Dhy-Dynamic Co., 107 Cal. Rep. 907 (Calif. Ct. App. 5th Dist. 1973) 26
Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424 (1939).... 18
South Austin Drive-In Theatre v. Thomison, 421 S.W.2d 933 (Tex. Civ. App.—Austin 1967, writ ref. n.r.e.) 27
Spruill v. Boyle-Midway, Inc., 308 F.2d 79 (4th Cir. 1962) 27
Switzer Bros., Inc. v. Locklin, 297 F.2d 39 (7th Cir. 1961), *cert. denied*, 369 U.S. 851 (1962) 31
Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1974) 27
Turner v. General Motors Corp., 514 S.W.2d 497 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref. n.r.e.)...... 28
Usner v. Luckenbach Overseas Corp., 400 U.S. 494 (1971) 12
Vella v. Ford Motor Co., _____U.S._____, 95 S.Ct. 1381 (1975) 17
Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971)....... 15
Waldron v. Moore-McCormack Lines, Inc., 386 U.S. 724 (1967) 12
Walsh v. Miehle-Goss-Dexter, Inc., 378 F.2d 409 (3rd Cir. 1967) 23
Warner v. Goltra, 293 U.S. 155 (1934) 34

CASES

Page

Warner v. Goltra, 67 S.W.2d 47 (Mo. Sup. 1933)........ 34
Watz v. Zapata Off-Shore Co., 431 F.2d 100 (5th Cir. 1970) 16, 27
Weakley v. Fishbach & Moore, Inc., _____F.2d_____ (5th Cir., No. 74-1499, filed July 21, 1974) 23, 26
Woods v. Turner, 172 F.2d 313 (10th Cir. 1949)........ 31
Zimmerman v. Montour R.R. Co., 296 F.2d 97 (3rd Cir. 1961), *cert. denied*, 369 U.S. 828 (1962) 30

CONSTITUTION AND STATUTES

Article III, §2, cl. 1, CONSTITUTION OF THE UNITED STATES OF AMERICA 15
RULE 52(a), FEDERAL RULES OF CIVIL PROCEDURE 12, 33, 35, 37
TITLE 28, UNITED STATES CODE, §1333 17
TITLE 45, UNITED STATES CODE, §51 18
TITLE 46, UNITED STATES CODE, §688 ....17, 32, 33, 37
TITLE 46, UNITED STATES CODE, §713 34

MISCELLANEOUS

RESTATEMENT (SECOND) OF TORTS, §395 15
RESTATEMENT (SECOND) OF TORTS, §402A 13, 14, 19, 20, 21, 22, 25, 28
  comment *b* 19
  comment *g* 27
  comment *i* 22
  comment *n* 25
G. Gilmore & C. Black, THE LAW OF ADMIRALTY (2d Ed. 1975) 15
R. Hursh & H. Bailey, AMERICAN LAW OF PRODUCTS LIABILITY 2d (1974) 20, 28
M. J. Norris, THE LAW OF SEAMEN (3rd Ed. 1970).. 30, 31
CCH PRODUCTS LIABILITY REPORTER (1975) 20, 28

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

NO. ____________

ROY C. WILLIAMS,
Petitioner,

v.

BRASEA, INC., VESSEL CIAPESC I, her engines, etc.,
BENDER WELDING & MACHINE COMPANY, INC.,
and CONSTRUCTION MACHINERY COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Roy C. Williams prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The District Court's memorandum opinion is not reported but is included in the Appendix contained herein at page 39. The judgment of the District Court appears in the Appendix at page 53. The opinion of the Court of Appeals is reported at 497 F.2d 67 and appears in the Appendix at page 56. The opinion denying Motions for

Rehearing and Rehearing En Banc is as yet unreported, but is contained in the Appendix at page 79.

JURISDICTION

The District Court's memorandum opinion was filed April 24, 1972. That Court's judgment was entered June 5, 1972. The opinion of the Court of Appeals was entered July 5, 1974 and the opinion denying Motions for Rehearing and Rehearing En Banc was entered May 23, 1975. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I.

Should a seaman's claims against the vessel and its owner for injuries occurring at sea as a result of an unseaworthy condition be determined by application of the general maritime law rather than the theory of strict product liability.

II.

Is a seaman's claim against manufacturers and sellers of defective ship's equipment for injuries occurring at sea beyond the territorial jurisdiction of any state, determined by the general maritime law as it incorporates Section 402A of the Restatement (Second) of Torts rather than by concepts of strict product liability alone, that are neither uniformly recognized nor applied within the several states, and many of which are contrary to existing standards of admiralty law.

III.

The District Court held that a fellow crew member was negligent in turning on the power to a cathead without making any reasonable effort to ascertain whether the master was out of danger, although he knew the master was untangling a line on the cathead with his hands at the time. The Court of Appeals held this finding to be clearly erroneous in the absence of an additional finding that the master did not order the power turned on. Does the Jones Act permit a distinction to be made between masters and crew members of a shrimp trawler so that in addition to proving that the fellow crewman failed to use reasonable care which was a proximate cause of his injuries, the master also has the burden of proving and obtaining a separate finding that he did not give an instruction to turn on the winch even though the District Court, in that portion of its findings of fact and conclusions of law dealing with the master's comparative fault, stated that it was not prepared to find that such an instruction was given.

STATUTES INVOLVED

The pertinent provisions of Article III, Section 2 of the Constitution of the United States of America; Title 28, United States Code, Section 1333; and Title 46, United States Code, Section 688 is found at page 83 of the Appendix. Rules 9(h) and 52(a), Federal Rules of Civil Procedure are found at page 85.

STATEMENT OF THE CASE

On December 10, 1969, Roy Williams' career as a seaman ended abruptly with the loss of both of his arms. At the time of this tragedy, he was serving as master of the vessel, CIAPESC I, which was trawling for shrimp in the Gulf of Mexico 10.35 miles off the Texas coast. Aboard with Williams were two crewmen, Edward Terry and Jeremiah Richo. Respondent, Brasea, Inc. (Brasea) was the owner and operator of the vessel and the employer of Williams and the other crewmen. At a point approximately amidships of the vessel was a power winch designed and manufactured for use on shrimp boats by Respondent, Construction Machinery Company (CMC), and installed by Respondent, Bender Welding and Machine Company, Inc. (Bender), the ship's designer and builder. The winch had three drums which revolved when power was supplied to the winch. Attached to and extending aft from the port-side and middle drums were two catheads, less than three feet apart. Overhead and between the two drums, as part of the power take-off system, Bender had installed a push-pull handle that the winch operator used to engage the power to the winch, and thus to the catheads. In order to reach the handle, it was necessary for the operator to stand on a raised metal platform between the catheads and lean over the drums. As designed and manufactured, the catheads would continue to rotate or freewheel several times after the power was shut off. One of the uses for which the winch was designed was to assist the crew in picking up the nets from the water. This was accomplished by wrapping the free end of the line from the net (whipline) around a cathead and engaging the power so that the rotation of the cathead would pull the net alongside the vessel and out of the water up to the deck. The winch is shown in Plaintiff's Exhibits 3, 5 and 10, which were admitted into evidence by the District Court and appear in the Appendix at pages 91, 92 and 93.

Immediately preceding the injury, the crew was picking up the port-side net when the whipline became tangled on the port cathead. Terry, who was operating the winch, disengaged the power to the cathead in order to avoid damage to the ship's rigging. Williams, who had been below, came on deck to see what had occurred and recognizing the problem, told Terry to pull on the whipline from overhead to create some slack while he began untangling the line around the cathead with his hands. At about this time, Terry turned on the power to the cathead, catching Williams' left hand in the tangle. Williams yelled to Terry to cut off the power, which was done immediately, but the cathead continued to rotate, entangling Williams' right hand and arm in the line and pulling him into and over the cathead several times. The resulting injuries required that Williams be flown by Coast Guard helicopter to the Marine Hospital in Galveston where the remnants of both his arms were removed.

Thereafter, Williams brought suit against Respondents in the United States District Court of the Southern District of Texas, Corpus Christi Division, in Admiralty under Rule 9(h), Federal Rules of Civil Procedure. Jurisdiction of the Federal Court was predicated on the general maritime law and 46 U.S.C. Section 688, the "Jones Act". Williams alleged his injuries were caused in whole or in part by the unseaworthy condition of the vessel, the negligence of Terry, CMC and Bender, the unreasonably dangerous condition of the winch as designed, manufactured and sold by CMC and the unreasonably dangerous condition of the vessel as designed, manufactured and sold by Bender. Brasea asserted a cross-action for indemnity against Bender and CMC. Bender asserted a cross-action for indemnity against CMC. All claims were tried by the Court without a jury.

Because of the conflicting manner in which the case was determined, first by the District Court and then by the Court of Appeals, some detail of the holdings of those

Courts is necessary in order to present the facts material to the consideration of the questions presented herein.

The District Court held that Brasea was liable to Williams because its employee, Terry, was negligent in turning on the power to the cathead without making a reasonable effort to ascertain whether Williams was out of danger. The Court found that the installation of the snatch-block frame by Bender resulted in the whipline reaching the cathead at an angle other than ninety degrees (lack of fair lead) which caused the line to tangle on the cathead. This was held to render the winch defective and unreasonably dangerous to users thereof and to be a producing cause of Williams' injuries. The Court also held that the failure of CMC to provide a brake to stop the rotating cathead after the power was disengaged rendered it defective and unreasonably dangerous and a producing cause of Williams' injuries. Brasea was also held liable to Williams because the position of the snatch-block frame, the lack of an independent brake to the port cathead, and the position of the rod used to control the power to the winch of the CIAPESC I created an unseaworthy condition. The Court found Williams' damages totaled $527,500.00. Although the Court specifically stated it was "not prepared to find that Plaintiff gave Terry specific instructions to turn on the power" it found that Williams was negligent in trying to untangle the line "when a crew member was close to the rod which only had to be pushed in to start the power and thus turn the cathead, and he should have known better." Based on this, the Court reduced Williams' recovery by forty percent to $316,500.00. Brasea, CMC and Bender were each held primarily liable to Williams for one-third of the judgment ($105,500.00) and secondarily liable to him for two-thirds thereof

($211,000.00). All cross-claims for indemnity were denied. Although the CIAPESC I was found to be unseaworthy and judgment against Brasea was entered *in personam,* the Court failed to enter judgment *in rem* against the vessel.[1] All parties appealed from the judgment of the District Court.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court in part, reversed in part and remanded the case to the District Court with directions. With regard to the findings of negligence *vis-a-vis* Williams and Terry the Court of Appeals held that the trial Court's findings pertaining to Terry's negligence were "clearly erroneous" because "the lower Court concluded that Terry was negligent because he failed to make a reasonable effort to be sure that Williams was free from danger when he cut the power on, *even if* Williams had ordered him to cut it on." Based on this assumption that Williams ordered the power turned on, the Court of Appeals then held that Terry was under an absolute duty to obey such an order without regard to the consequences of his actions and without making any effort to ascertain whether Williams' hands were on the cathead, even though the District Court had found that Terry knew Williams was untangling the line with his hands. The Court also held that in the absence of such an order, Williams could not be contributorily negligent in failing to foresee that Terry would turn on the power. For this reason, the case was ordered remanded to the District

---

[1] Brasea's Petition for Exoneration from or Limitation of Liability is still pending in Civil Action No. 69-B-162, in the United States District Court for the Southern District of Texas, Brownsville Division. The CIAPESC I was released by the Court on Brasea's posting of a bond in the amount of $90,000.00.

Court to determine again whether Williams ordered Terry to turn on the power.

With regard to the liability of Bender and CMC, the Court of Appeals refused to pass on whether the general maritime law, under which Williams' claim initially arose, incorporated to any extent the law of strict product liability. Instead, the Court concluded that Williams had failed to establish liability against Bender and CMC under the theory of strict product liability, as expressed in Section 402A of the Restatement (Second) of Torts, without regard to the general maritime law. In reversing the District Court, it held that neither the lack of a fair lead nor the lack of a brake to the cathead was unreasonably dangerous because tangles on the cathead and the continued rotation of the cathead after the power was shut off was "within the contemplation" of seamen such as Williams. It further held that there could be no proximate cause under the facts because neither Bender nor CMC could "foresee" the manner in which the injury would occur. Finally, the Court concluded that if Williams ordered the power turned on, he assumed the risk of injury which provided both Bender and CMC with a complete defense under the Restatement. If on the other hand, Terry turned on the power without instruction from Williams, it was a misuse of the product which also provided a complete defense to both Respondents.

Because of its determination that neither Bender nor CMC was liable to Williams under the theory of strict product liability, the Court of Appeals held that Williams' arguments relating to joint and several liability and reduction of the judgment based on Williams' comparative negligence as it related to these Respondents was moot. Brasea's appeal relating to indemnity from Bender and CMC was also denied.

Finally, the Court of Appeals ordered the District Court on remand to enter judgment *in rem* against the CIAPSEC I, pointing out that the finding that the vessel was unseaworthy was not challenged on appeal by Brasea either on brief or at oral argument.

From this opinion, both Williams and Brasea filed Motions for Rehearing and Rehearing En Banc. In its opinion of May 23, 1975, the Court of Appeals denied these motions and further amended its original opinion to deny Williams judgment against the CIAPESC I, *in rem* for the reason that the trial Court's findings of an unseaworthy condition were based on the same findings of fault relating to the liability of Bender and CMC and in light of the disposition of those claims, the question of the unseaworthy condition of the vessel was considered to be "moot".

REASONS FOR GRANTING THE WRIT

I.

THE DENIAL OF PETITIONER'S UNSEAWORTHINESS CLAIMS SOLELY BY APPLICATION OF COMMON LAW NEGLIGENCE CONCEPTS AND WITHOUT REGARD TO THE GENERAL MARITIME LAW IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND SO FAR DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN ADMIRALTY AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The District Court found that "at the time the rope line bringing in the nets was tangled on the port cathead, the vessel, and particularly the area in front of the winch, was not suitable for its intended use and thus unseaworthy."[2] Although judgment against the owner Brasea was entered *in personam,* the Court failed to enter judgment *in rem* against the vessel. In its first opinion, the Court of Appeals ordered that the District Court on remand enter judgment against the vessel based on its findings of unseaworthiness.[3] In its *per curiam* opinion denying both Petitioner's and Brasea's Motions for Rehearing, the Court of Appeals reversed its original holding and instead, determined that Petitioner's unseaworthiness claims against the ship should be decided under the same legal conclusions used to dispose of Petitioner's claims against Bender and CMC.[4] The monadic legal justification relied on to render "moot" and reverse the District Court's findings and conclusions relative to these two separate and distinct claims was held to be a failure to properly apply the law of strict product liability to the facts of the case.[5] In short, the Court of Appeals decided Petitioner's unseaworthiness claim against the ship and its owner based on an interpretation of the law of product liability rather than maritime law.

---

[2] App. at page 46.

[3] *Williams v. Brasea, Inc.,* 497 F.2d 67, 68 (5th Cir. 1974); App. at page 67-68.

On brief and in oral argument before the Court of Appeals, Brasea's objections to the findings and conclusions of the District Court were limited to the failure of the District Court to award indemnity over against Bender and CMC. Only after oral argument and entry of the July 5, 1974 opinion of the Court of Appeals did Brasea suggest in its Brief in support of its Motion for Rehearing that it should be afforded the same defenses as Bender and CMC. While Petitioner acknowledges the merit of Brasea's claim for indemnity as against Bender and CMC in creating the unseaworthy condition, the validity of such a claim is not determinative of the initial question of whether the shipowner breached his maritime duty to provide a seaworthy vessel to Williams. *Sieracki v. Seas Shipping Co.,* 149 F.2d 98, 99-100 and 101-102 (3rd Cir. 1949), *aff'd.,* 328 U.S. 85 (1946).

[4] "Our disposition reversing the District Court as to the cross-appeals of Bender and CMC, Parts IV and V of this opinion, *infra,* eliminates any basis for holding CIAPESC I liable *in rem.* The point is rendered moot." App. at page 82.

The decision of the Court of Appeals demands this Court's review because it constitutes a radical and unwarranted departure from one of the most basic, firmly established principles of admiralty law. The determination of whether a vessel is unseaworthy has consistently been held to be solely controlled by concepts peculiar to the general maritime law and is not limited by concepts grounded in common law tort or contract. *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 94 (1946); *accord, Mitchell* v. *Trawler Racer, Inc.,* 362 U.S. 539, 547-550 (1960), and cases cited therein. Petitioner's unseaworthiness claim in this case was determined by the Court of Appeals relying *exclusively* on negligence concepts of assumption of risk, and intervening negligence.[6]

Knowledge of a defective condition, voluntary exposure to a known and appreciated danger, foreseeability, failure to use a safe alternative and the other variations which make up the common law defense of assumption of risk are not defenses available to a shipowner to defeat a seaman's claim for personal injuries resulting from unseaworthy appliances. *Mahnich v. Southern S. S. Co.,* 321 U.S. 96, 103 (1944). Even if the equipment of the ship is otherwise safe, its misuse or mishandling by a fellow worker may render it unseaworthy. *Crumady v. The JOAHCHIM HENDRIK FISSER,* 358 U.S. 423, 427-428 (1959). Nor is the negligence of a fellow servant in causing the unseaworthy condition a defense to the shipowner. *Mahnich,* 321 U.S. at 102-103. In fact, an unseaworthy condition may be brought about by a non-negligent act or omission of a crew member. *Waldron v. Moore-McCormack Lines, Inc.,* 386 U.S. 724 (1967). Whether the shipowner could reasonably foresee either that the defective condition would occur or that injury would result therefrom has no place in a claim based on unseaworthiness. *Michalic v. Cleveland Tankers, Inc.,* 364 U.S. 325, 327-328 (1960); *Mitchell,* 362 U.S. at 548; *Sieracki,* 328 U.S. at 94-95. Liability based upon unseaworthiness is wholly distinct from liability based upon negligence because "unseaworthiness is a *condition* and how that condition came into being—whether by negligence or otherwise—is quite irrelevant to the owner's liability for personal injuries resulting from it." *Usner v. Luckenbach Overseas Corp.,* 400 U.S. 494, 499 (1971).

---

[5] *Williams,* 497 F.2d at 78; App. at page 74.

[6] *Williams,* 497 F.2d at 78-79; App. at page 75-78.

Whether a condition renders a vessel unseaworthy is ordinarily a question of fact to be determined by the District Court, sitting without a jury, and that finding will be considered as controlling unless shown to be clearly erroneous. *Mahnich,* 321 U.S. at 98-99; *Luckenbach v. W. J. McCahan Sugar Refining Co.,* 248 U.S. 139, 145 (1918). The finding of the District Court that the vessel was unseaworthy under the maritime law was not held by the Court of Appeals to be "clearly erroneous" under Rule 52(a), Federal Rules of Civil Procedure. Instead, the Court of Appeals concluded that the conduct of either Terry or Williams afforded the shipowner complete defenses for failing to provide a seaworthy vessel. This is contrary to the modern admiralty policy and practice that a seaman's contributory negligence may be considered only in mitigation of damages as justice requires. *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 408-410 (1953).

The opinion of the Court of Appeals not only holds that assumption of risk is a defense to Petitioner's claims for unseaworthiness, but also that the intervening negligence of a crew member acts as a complete bar to recovery. To afford the shipowner the boon of complete defenses heretofore rejected in admiralty is inimical to the traditional rights enjoyed by seamen "who are peculiarly the wards of admiralty" and is a clear departure from the rule that the legal rights and liabilities of parties subject to the federal maritime jurisdiction are to be determined solely by the standards of federal maritime law. *Mahnich,* 321 U.S. at 101-103; *Carlisle Packing Co. v. Sandanger,* 259 U.S. 255 (1922).

While it may be true as a general statement that products liability is a form of passive tort, analogous to unseaworthiness,[7] the doctrine of unseaworthiness does not incorporate the negligence concepts implicit in the Court of Appeals interpretation of Section 402A of the Restatement to accord shipowners a diminution of the obligations owed by them to seamen injured while engaged in the service of their vessels.[8]

---

[7] *Williams,* 497 F.2d at 79; App. at page 70.

[8] *In Re MARINE SULPHUR QUEEN,* 460 F.2d 89 (2d Cir. 1972). In this case, the Court of Appeals emphasized the separate nature of the two concepts in holding that survivors of deceased seamen killed when their vessel disappeared under unknown circumstances were entitled to the permissible inference that an unseaworthy condition caused the vessel to sink, but were not entitled to that inference regarding strict liability claims relating to the shipbuilder's defective design and reconstruction of the vessel, because "[t]he duty of providing the crew with a seaworthy ship runs only to the owner, and the shipbuilder neither employs the crew nor can he control what happens to the ship once she leaves his yard." *Id.* at 101.

> There is ample room for argument in light of history, as to how the law of unseaworthiness should have or could have developed. Such theories might be made to fill a volume of logic. But, in view of the decisions in this Court over the last 15 years, we can find no room for argument as to what the law is. What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence. To hold otherwise now would be to erase more than just a page of history. *Mitchell,* 362 U.S. at 550.

Because the holding of the Court of Appeals on the question of whether judgment *in rem* should have been entered in favor of Petitioner and against the CIAPESC I is contrary to and deviates from established admiralty law and procedure, it should be reviewed by this Court.

II.

IN FAILING TO APPLY THE GENERAL MARITIME LAW TO PETITIONER'S CLAIMS AGAINST BENDER AND CMC FOR INJURIES OCCURRING AT SEA OUTSIDE OF STATE TERRITORIAL JURISDICTION, THE COURT OF APPEALS HAS DECIDED A QUESTION OF FEDERAL MARITIME TORT LAW IN A MANNER THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL.

The Court of Appeals refused to apply federal maritime law in determining the legal rights and obligations governing Petitioner's claims against Bender and CMC, adopting instead a negligence-laden interpretation of Section 402A of the Restatement (Second) of Torts and the comments thereto.[9] The effect of this holding raises the important federal question of whether maritime or non-maritime law governs a suit for injuries to a seaman occurring on board a vessel engaged in maritime commerce on navigable waters as a result of allegedly defective ship's equipment designed and sold by shoreside manufacturers.

---

[9] *Williams,* 497 F.2d at 78-79; App. at pages 75-78.

Whether federal maritime law governs a cause of action depends on whether it is a case within the admiralty and maritime jurisdiction conferred on the federal district courts by the Constitution and jurisdictional statutes of the United States. *Victory Carriers, Inc. v. Law,* 404 U.S. 202, 204 (1971). This Court has repeatedly affirmed that the maritime tort jurisdiction of the federal courts is determined by the locality of the injury and that maritime law governs those torts relating to maritime service which occur on navigable waters. *Id.,* at 205; *e.g., Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 628-629 (1959); *Atlantic Transport Co. v. Imbrovek,* 234 U.S. 52, 60-63 (1914). The jurisdictional facts of this case and the allegations of Williams against Bender and CMC standing alone required that the Court of Appeals consider the question of whether maritime law applied to those claims.[10]

The maritime law, as it exists and is applied in modern times, has been substantially influenced over the years by common law concepts.[11] Thus, it has been generally recognized that a products liability action for injuries resulting from the negligent design or manufacture of products [12] is "part of the general law of torts, maritime as well as common law." *Sieracki v. Seas Shipping Co.*, 149 F.2d 98, 99-100 (3rd Cir. 1945), *aff'd.*, 328 U.S. 85 (1946); *Watz v. Zapata Off-Shore Co.*, 431 F.2d 100 (5th Cir. 1970); *Schaeffer v. Michigan-Ohio Navigation Co.*, 416 F.2d 217 (6th Cir. 1969); *Noel v. United Aircraft Corp.*, 342 F.2d 232 (3rd Cir. 1964); *Krause v. Sud-Aviation, Societe Nationale de Constructions Aeronautiques*, 301 F.Supp. 513 (S.D.N.Y. 1968), *aff'd.*, 413 F.2d 428 (2nd Cir. 1969).[13] Likewise, it is generally acknowledged by the lower federal courts that the general maritime law recognizes a cause of action against manufacturers in strict tort liability.[14] Two of the Circuit Courts of Appeal have specifically held that an action against the manufacturer under the theory of strict product liability may be maintained under the federal district court's maritime tort jurisdiction. *Lindsay v. McDonnell Douglas Aircraft Corp.*, 460 F.2d 631 (8th Cir. 1972); *McKee v. Brunswick Corp.*, 354 F.2d 577 (7th Cir. 1965). The refusal of the Court of Appeals to consider the question of whether the law of strict product liability is now incorporated in the maritime law is in conflict with these decisions.

---

[10] U. S. Const. Art. III, §2; 28 U.S.C. §1333(1) (1949).

[11] G. Gilmore & C. Black, THE LAW OF ADMIRALTY §1-16 (2d Ed. 1975).

[12] RESTATEMENT (Second) OF TORTS, §395.

---

[13] In *Simpson Timber Co. v. Parks*, 369 F.2d 324 (9th Cir. 1966), *cert. granted, vacated and remanded*, 388 U.S. 459 (1967), *aff'd. in part, remanded in part*, 390 F.2d 353 (9th Cir. 1968), a longshoreman sued the shipowner and manufacturer for injuries sustained when he stepped through the packaging of a bundle of doors. The United States Court of Appeals for the Sixth Circuit has cited this case ". . . as an example of a product liability case within admiralty jurisdiction where the Supreme Court action implicitly recognized the validity of the cause of action." *Schaeffer*, 416 F.2d at 221. But *see Watz*, 431 F.2d at 113, n. 16.

[14] A definitive discussion of the evolution of strict product liability from a warranty concept of common law to an accepted part of maritime tort law is contained in *In Re Alamo Chemical Transportation Co.*, 320 F.Supp. 631 (S.D. Tex. 1970).

In addition, the holding of the Fifth Circuit clearly departs from the numerous decisions of this Court holding that the substantive and procedural maritime rules governing the rights of seamen under admiralty law, in tort actions arising under federal maritime jurisdiction, may not be supplanted by application of state or common law rules. As previously stated, the negligence concepts of assumption of risk, including foreseeability on the part of either the seaman or the ship's owner and the negligent conduct of a fellow servant upon which the Court of Appeals' decision is based, have been held not to be defensive to a claim for unseaworthiness.[15] It is now beyond dispute that those concepts have no place in a seaman's action for maintenance and cure — only his gross and willful misconduct being a defense thereto. *E.g., Vella v. Ford Motor Co.,* ___ U.S. ___, 95 S.Ct. 1381 (1975).

In a seaman's maritime tort action alleging negligence, this Court almost sixty years ago stated that although under the saving clause,[16] a right sanctioned by the maritime law may be enforced through an appropriate common law remedy, the determination of a defendant's liability is measured by maritime rather than common law standards—a seaman's rights are those recognized by the law of the sea. *Chelentis v. Luckenbach S.S. Co., Inc.,* 247 U.S. 372, 384 (1918). In *The ARIZONA v. Anelich,* 298 U.S. 110 (1936), the Court concluded that since asumption of risk had never been recognized as a defense under maritime law, it was not available to defendants under the Jones

---

[15] See argument and authorities relative to Reason I, *supra.*

[16] Act of March 3, 1911, ch. 231, 36 Stat. 1092, *as amended,* 28 U.S.C. §1333(1) (1949).

[17] 46 U.S.C. §688.

Act[17] even though that act specifically incorporated the provisions of the FELA,[18] under which the defense of assumption of risk was still available at that time. On the same day, the Court also stated that "[c]ontributory negligence is not a defense to a suit brought either under the Jones Act or under the maritime law for injuries attributable to negligently defective equipment." *Beadle v. Spencer,* 298 U.S. 124, 131 (1936). The fact that a seaman may know and appreciate that a ship's appliance is in a dangerous condition, but voluntarily elects to use that appliance, even when a safer alternative is available, will not serve as a defense to one who creates the dangerous condition. *Socony-Vaccuum Oil Co. v. Smith,* 305 U.S. 424 (1939); *accord, Jacob v. City of New York,* 315 U.S. 752 (1942).

> Any rule of assumption of risk in admiralty, *whatever its scope,* must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it. Under that doctrine contributory negligence, *however gross,* is not a bar to recovery but only mitigates damages. *Smith,* 305 U.S. at 431 (emphasis added).

Nor is it necessary that one who furnishes inadequate or defective equipment be in a position to foresee the exact chain of circumstances that actually leads to a seaman's injury. *Ferguson v. Moore-McCormack Lines, Inc.,* 352 U.S. 521 (1957).

The application of admiralty law in cases brought under the federal court's maritime tort jurisdiction is not limited solely to the determination of defensive issues. The quantum of negligence necessary to establish liability under the Jones Act was held to be less than that required under the FELA because "[t]he conditions of sea differ widely from those on land, and the diversity of conditions breeds diversity of duties." *Cortes v. Baltimore Insular Line,* 287 U.S. 367, 377-378 (1932). Similarly, it was held that the issue of proximate cause in a Jones Act case may be determined by whether the facts of the occurrence warrant the inference of negligence, the maritime equivalent of *res ipsa locquitor. Johnson v. United States,* 333 U.S. 46 (1948); *see Schulz v. Pennsylvania R.R. Co.,* 350 U.S. 523 (1956).

---

[18] 45 U.S.C. §51, *et seq.*

A seaman's cause of action in products liability, whether based on standards of strict tort liability or negligence, was unknown in admiralty until recent years. Its incorporation into the federal maritime law was to accomplish the dual purpose of according to those who labor at sea the same protection due their terrestrial counterparts and to achieve one of the primary goals of admiralty law, uniformity. *Lindsay,* 460 F.2d at 637; *McKee,* 354 F.2d at 584; *see* cases cited at page 19, *supra.* The present situation is thus analogous to the incorporation of the provisions of the FELA into maritime tort law by the Jones Act in 1920. *The ARIZONA,* 298 U.S. 110. But the source from which the concepts peculiar to the law of strict product liability were derived do not rest on immutable statutory provisions enacted by Congress to effect these purposes, but rather on medieval criminal laws and common law theories of warranty and negligence as developed by the common law courts.[19] The Restatement (Second) of Torts §402A (1965) is not a statutory nor a judicial definition of the law of strict product liability, but simply a statement of the theory of that law as approved by the American Law Institute. The Courts of the various states that have adopted it have defined and applied it within their jurisdiction in varying ways, depending on whether their interpretation was guided by common law tort or warranty concepts.[20] There are no historical, legislative or judicial prescriptions as to the operation of the law of strict product liability in the maritime field to which it has been transferred. In that field, the extent of its application and operation must be determined solely by the federal courts in the exercise of their maritime tort jurisdiction. The election available to the federal courts in applying the law of strict product liability is between alternatives accorded by the maritime law as modified by §402A, and not between the maritime law and some nonmaritime system. *The ARIZONA,* 298 U.S. at 119. Thus in *Lindsay,* the Eighth Circuit held that the incorporation of strict product liability into maritime tort law did not include the principle that the negligence of the user of a defective product would operate as a complete bar to recovery, but rather that the admiralty rule of comparative negligence should apply. 460 F.2d at 636. The failure of the Court of Appeals to recognize this basic principle warrants this Court's review.

---

[19] RESTATEMENT (Second) OF TORTS §402A, comment *b.*

But there are other features of the opinion of the Court of Appeals in this regard that warrant review by this Court. One of the more obvious problems (in addition to the Court's disregard of the maritime law) inherent in the opinion is that there is no indication of the legal source or sources from which the Court derived its interpretation of Section 402A. The only legal authorities referred to in support of its conclusions were two diversity cases decided on interpretations of Texas law.[21] Neither of these cases involved a maritime cause of action nor do they correctly express the law of strict product liability as it would have applied to the facts of this case had Williams' injuries occurred on Texas soil rather than 10.35 miles from its coast and outside any state's territorial jurisdiction. While this Court has held that federal admiralty courts may recognize and enforce a liability which a state has established in the absence of an available remedy under the general maritime law, application of such state created rights and remedies in maritime tort actions have in the past always been limited by two important considerations: (1) the injury must have occurred within the state's territorial jurisdiction and (2) the state law must not be hostile to the characteristic features of maritime law or inconsistent with federal legislation. *See, e.g., Just v. Chambers,* 312 U.S. 383, 387-388 (1941). Aside from the basic flaw that the Court's interpretation and application of Section 402A is decidedly in conflict with the fundamental concepts of maritime tort law, there is no evident reason why the law of strict product liability as applied in Texas or any other state should govern a Texas seaman's claim against Iowa (CMC) and Alabama (Bender) defendants for injuries occurring on the high seas.

---

[20] The status of the theory of strict tort liability in the various states may be found at R. Hursh & H. Bailey, AMERICAN LAW OF PRODUCTS LIABILITY 2d §4:41 (1974); 1 CCH PRODUCTS LIABILITY REP. ¶4060 (1975).

Less evident, but of significant importance in the future determination of seamen's product liability claims in admiralty, is the conflict between the decision in this case and the decisions of other state and federal courts over the correct interpretation to be accorded to Section 402A.

---

[21] *Helene Curtis Industries, Inc. v. Pruitt,* 385 F.2d 841 (5th Cir. 1967), *cert. denied,* 391 U.S. 913 (1968); *Ross v. Up-right, Inc.,* 402 F.2d 943 (5th Cir. 1968).

The basis for the Court of Appeals' determination that Williams as a matter of law had failed to establish liability under the theory of strict product liability may be summarized as follows: (1) that there existed no defective conditions, unreasonably dangerous to the crew of the CIAPESC I, because it was obvious or patent to all on board that there was no brake to prevent the cathead from rotating after the power was disengaged and that lines had a propensity to tangle on the catheads; and (2) that there was an absence of proximate cause because, (a) *assuming* Williams ordered the power turned on, the defendants could not reasonably foresee that he would do so while his hands were in the line on the cathead and by such order he assumed the risk of injury, or (b) *assuming* Terry acted without orders in turning on the power, the defendants could not reasonably foresee he would do so while Williams' hands were on the line and such action by Terry constituted a misuse of the products.[22]

Contrary to the decision of the Court of Appeals, it has been held that the liability of a manufacturer under Section 402A is not predicated on whether the product was "unreasonably dangerous", but is established simply by showing the product was defective, that the defect proximately caused harm to the Plaintiff and that the Plaintiff was a foreseeable user of the product. *Cronin v. J. B. E. Olson Corp.*, 501 P.2d 1153, 1158-1163 (Calif. Sup. 1972); *Glass v. Ford Motor Co.*, 304 A.2d 562, 564 (N.J. Super. Law Div. 1973). Comment *i* to Section 402A is not a proper definition of whether the product is either defective or unreasonably dangerous, its only purpose being to prevent sellers of products with inherent possibilities of harm from becoming automatically responsible for all the harm that such things do in the world. *Pyatt v. Engel Equipment, Inc.,* 309 N.E.2d 225, 228-229 (Ill. Ct. App. 3rd Dist. 1974). "As used in the Restatement, 'defective' means 'unreasonably dangerous'; it has no independent significance." *Borel v. Fibreboard Paper Products Corp.,* 493 F.2d 1076, 1087 at note 20 (5th Cir. 1973), *cert. denied,* ____U.S.____, 95 S.Ct. 127 (1974), applying Texas law.

---

[22] *Williams*, 497 F.2d at 78-79; App. at pages 75-78.

Whether the user of a defectively designed or manufactured product is aware of the defect is not determinative of the manufacturer's primary liability under Section 402A. *Davis v. Fox River Tractor Co.,* ____F.2d____ (10th Cir., No. 74-1392, filed June 10, 1975), applying Oklahoma law. "The point is that to preclude absurd results the obviousness of the danger must constitute but *one* of the factors that determines whether the danger is unreasonable." *Dorsey v. Yoder Co.,* 331 F.Supp. 753, 759 (E.D. Pa. 1971), *aff'd.,* 474 F.2d 1339 (3rd Cir. 1973); *accord, Ford v. Harnischfeger Corp.,* 365 F.Supp. 602 (E.D. Pa. 1973). Other Courts hold that the user's knowledge is not to be considered in initiallyetering whether the product is defective, but is relative only to raising the affirmative defensive issue of whether the manufacturer is excused from selling a defective product by the user's conduct. *Weakley v. Fishbach & Moore, Inc.,* ____F.2d____ (5th Cir., No. 74-1499(filed July 21, 1975), applying Texas law; *Luque v. McLean,* 501 P.2d 1163 (Calif. Sup. 1972); *Brown v. Quick Mix Co.,* 454 P.2d 205 (Wash. Sup. 1969); *see Messick v. General Motors Corp.,* 460 F.2d 485 (5th Cir. 1972), applying Texas law; *Elder v. Crawley Book Machinery Co.,* 441 F.2d 771 (3rd Cir. 1971), applying Pennsylvania law; *Walsh v. Miehle-Goss-Dexter, Inc.,* 378 F.2d 409 (3rd Cir. 1967), applying Pennsylvania law;

Powell v. E. W. Bliss Co., 346 F.Supp. 819 (W.D. Mich. 1972); *Rourke v. Garza,* 511 S.W.2d 331 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ granted). Under these authorities, the District Court's findings of fact clearly justified its conclusion that the lack of a fair lead and brake to the cathead created a defective and unreasonably dangerous condition to users such as Roy Williams.[23]

The Court of Appeals further held as a matter of law that there was no "proximate cause" between the defective condition of the winch and Williams' injuries because of a lack of common law foreseeability.[24] The District Court, however, found such defects to be a "producing cause of the injuries."[25] The difference is more than semantic. As applied by the Court of Appeals and the Texas Courts' proximate cause includes the element of foreseeability and is the definition used in negligence cases, not cases of strict tort liability. *Burrus Feed Mills, Inc. v. Reeder,* 391 S.W.2d 121, 127 (Tex. Civ. App.—Amarillo 1965, no writ hist.). In Texas under Section 402A, the Plaintiff need prove only "an efficient, exciting or contributing cause, which in a natural and continuous sequence, in connection with any other cause or causes produced the event complained of. There can be more than one producing cause of an event." *Rourke,* 511 S.W.2d at 339; *see Henderson v. Ford Motor Co.,* 519 S.W.2d 87, 89 (Tex. Sup. 1974); R. Hursh, *supra* note 20, §1:28. Common law foreseeability has no place in the concept of strict product liability cases involving defective design.

---

[23] The findings of the trial Court were not found to be clearly erroneous. Williams' claims against Bender and CMC were determined by the Court of Appeals as a matter of law without disturbing the findings of fact relating to these claims.

[24] *Williams,* 497 F.2d at 78-79; App. at pages 75 and 78.

[25] App. at pages 44 and 45.

Ethicon, Inc. v. Parten, 520 S.W.2d 527, 533 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ granted); *Hartzell Propeller Co., Inc. v. Alexander*, 485 S.W.2d 943, 946 (Tex. Civ. App.—Waco 1972, writ ref. n.r.e.); *see C. A. Hoover v. O. M. Franklin Serum Co.*, 444 S.W.2d 596 (Tex. Sup. 1969). In *Eshbach v. W. T. Grant's & Co.*, 481 F.2d 940 (3rd Cir. 1973), the Court explained that §402A does not require a manufacturer to foresee that a lawnmower designed for cutting grass will be used to cut logs or pipe, but does require that he foresee an injury resulting from a defect while the mower is being used to cut grass, even if the injury does not occur in a particular manner one might expect.

> It is to this extent, then, and to this extent only, that foreseeability enters into the strict liability equation. The use of the word foreseeability without the limits imposed by strict liability concepts improperly distorts the balance between the manufacturer and consumer embodied in §402A. *Id.*, 481 F.2d at 943.

At the time of injury, the crew of the CIAPESC I was using the winch for the specific purpose for which it was designed, hauling in the nets. Whether either Williams' or Terry's conduct provided a defense under §402A to those responsible for the defective conditions causing the injury was not dependent on the ability of Bender or CMC to foresee that conduct.

In order for Williams' conduct to provide a defense to Bender and CMC under comment *n* to §402A, it was necessary for the Court of Appeals to *assume* that Williams ordered the power turned on. This is because the availability of the defense of assumption of risk or *volenti non fit injuria* in strict tort liability cases is conditioned on proof that the user *voluntarily* (*i.e.*, by a free and intelligent choice) proceeded to encounter a known and appreciated danger and without regard to whether the user was contributorily negligent. *Henderson v. Ford Motor Co.,* 519 S.W.2d 87, 89-91 (Tex. Sup. 1974); *Runnings v. Ford Motor Co.,* 461 F.2d 1145 (9th Cir. 1972), applying Washington State law; *see Smith v. Dhy-Dynamic Co.,* 107 Cal. Rep. 907 (Calif. Ct. App. 5th Dist. 1973); *Bexiga v. Havir Mfg. Corp.,* 290 A.2d 281 (N.J. Sup. 1972). Mere knowledge of a dangerous condition cannot be equated with voluntary or unreasonable conduct. "It could never be said as a matter of law that a workman whose job requires him to expose himself to a danger, voluntarily and unreasonably encounters the same." *Brown v. Quick Mix Co.,* 454 P.2d 205, 208 (Wash. Sup. 1969); *see Devers v. Mobil Chemical Corp.,* 488 F.2d 258 (5th Cir. 1973), applying Texas law. But the basic fallacy in the Court of Appeals' argument in this regard is that the assumption on which it is grounded (that Williams ordered the power turned on) was held not to be supported by a factual finding of the District Court.[26] *Volenti* is an affirmative defense and the burden of proving all of its essential elements was on Bender and CMC. *Weakley,* ____F.2d____. If it was clearly erroneous for the District Court to conclude that Terry was negligent in the absence of a clear finding that Terry acted without a direct order, it is also clear that the absence of such a finding will not support a conclusion that Williams voluntarily and unreasonably proceeded to encounter a known and appreciated danger.

Finally, the opinion of the Court of Appeals rests on whether Terry's turning on the power without authority constituted an unanticipated product "misuse" as contained in comment *g* of Section 402A. Because at the time of injury, the winch was being used for its intended purpose of hauling in nets, Terry's negligence at most can only be characterized as an intervening force which brought the existing defective conditions into play to produce the injury, and this does not relieve the manufacturer of liability for selling a defectively designed or manufactured product. See *Watz v. Zapata Off-Shore Co.,* 431 F.2d 100, 116-117 (5th Cir. 1970); *South Austin Drive-In Theatre v. Thomison,* 421 S.W.2d 933, 951 (Tex. Civ. App.—Austin 1967, writ ref. n.r.e.). Where a defective condition increases the risk of a particular harm, the fact that the harm is ultimately brought about only by intervention of another force does not relieve the manufacturer from liability. *Eshbach v. W. T. Grant's & Co.,* 481 F.2d 940, 943-944 (3rd Cir. 1973), applying Pennsylvania law. The negligence of a third party assumes legal significance only if it is a superceding cause of the injury. *Kuisis v. Baldwin-Lima-Hamilton Corp.,* 319 A.2d 914, 920 (Pa. Sup. 1974). In any event, such questions of causation are to be determined by the trier of fact on the evidence presented. *Id.,* at 920-921; *Eshbach,* 481 F.2d at 945. In strict product liability, a manufacturer is held to have anticipated the environment which is normal for the use of its product and the risk attendant to such use, including the negligence of third parties. *Perez v. Ford Motor Co.,* 497 F.2d 82, 87 (5th Cir. 1974), applying Louisiana law; *Turcotte v. Ford Motor Co.,* 494 F.2d 173 at 180-182 (1st Cir. 1974); *Larsen v. General Motors Corp.,* 391 F.2d 495, 501-503 (8th Cir. 1968), applying Michigan law; *Spruill v. Boyle-Midway, Inc.,* 308 F.2d 79, 82-83 and 87-89 (4th Cir. 1962), applying Virginia law; *Ritter v. Narragansett Elec. Co.,* 283 A.2d 255, 260 (R.I. Sup. 1971); *Otis Elevator Co. v. Wood,* 436 S.W.2d 324,

---

[26] *Williams,* 497 F.2d at 72-73; App. at pages 60-63. It may be inferred however, that the District Court found that Williams did not give such an order. *See* argument and authorities relative to Reason III, *infra.*

328 (Tex. Sup. 1968); *Turner v. General Motors Corp.*, 514 S.W.2d 497, 503-505 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref. n.r.e.).

That the Court of Appeals' interpretation of Section 402A is in conflict with the decisions of other Courts is not surprising, but simply emphasizes the lack of uniformity that is present in this area. Not all states have adopted the theory and among those that have, legal rights and remedies vary depending on whether a particular state's judiciary interprets it on principles grounded in common law tort or warranty.[27] By failing to apply the same well-settled principles of maritime law which govern every other type of maritime-related tort occurring on navigable waters to Roy Williams' claims against Bender and CMC, the decision of the Court of Appeals virtually assures a lack of uniformity in the decision of other admiralty tort claims incorporating the theory of strict product liability.

Most recently, this Court has declared that a remedy for wrongful death is provided by the federal maritime law. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). The effect of this decision was to provide survivors of seamen a uniform remedy for wrongful death occurring on navigable waters regardless of location, whether within state territorial waters or on the high seas. The Court noted in its opinion that the maritime law has always been separate from the common law, developing general principles unknown to that system. "These principles included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable seas voyages." *Id.*, at 386-387 (citations omitted). The expressly intended result of the decision was to put an end to the existing nonuniformity occasioned by survivors' claims brought under various state and federal statutes providing a multiplicity of rights, limitations and remedies.

---

[27] *See* note 20 at page 20, *supra*.

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. *E.g.,* Hess v. United States, 361 U.S. 314, 80 S.Ct. 341, 4 L.Ed.2d 305 (1960); *Goett v. Union Carbide Corp.*, 361 U.S. 340, 80 S.Ct. 357, 4 L.Ed.2d 341 (1960). Such uniformity not only will further the concerns of both of the 1920 Acts but also will give effect to the constitutionally based principle that federal admiralty law should be "a system of law coextensive with, and operating uniformly in, the whole country." The Lottawanna, 21 Wall. 558, 575, 22 L.Ed. 654 (1875). *Id.,* at 401-402.

If for no other reason, the threat to the uniform application of the admiralty law posed by the opinion of the Court of Appeals justifies its review by this Court.

III.

IN HOLDING THAT THE DISTRICT COURT WAS CLEARLY ERRONEOUS IN CONCLUDING THAT TERRY WAS NEGLIGENT IN TURNING ON THE POWER TO THE WINCH, THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL, DECISIONS OF THIS COURT AND ITS OWN PRIOR DECISION.

Under the Jones Act, the burden of proof is upon the seaman to establish the negligence of the shipowner or his employee by a preponderance of the evidence.[28] In order to impose liability on Brasea for the conduct of its employee Terry, it was necessary for Williams to prove and for the District Court to find that Terry had been negligent in turning on the power to the winch. The factual findings of the District Court in this regard were: that at the time Terry engaged the power to the winch, he was standing between the catheads only a couple of feet from Williams; that he knew Williams was trying to untangle the line with his lands; and that he made no reasonable effort to ascertain that Williams was out of danger.[29] The District Court made *no finding,* either specifically or by implication, that Williams instructed Terry to turn on the power. On the findings the District Court concluded that Terry was negligent which was a proximate cause of Williams' injuries,[30] and accordingly, entered judgment against Brasea. On appeal, the findings of fact of the District Court should have been construed liberally and found to be in consonance with the judgment so long as the judgment was supported by evidence in the record. *Freeman v. Gould Special School Dist. of Lincoln Co., Ark.,* 405 F.2d 1153, 1156 (8th Cir. 1969), *cert. denied,* 396 U.S. 843 (1969); *Manning v. Jones,* 349 F. 2d 992, 996 (8th Cir. 1965); *Blumenthal v. United States,* 306 F.2d 16, 17-18 (3rd Cir. 1962); *Zimmerman v. Montour R.R. Co.,* 296 F.2d 97, 98 (3rd Cir. 1961), *cert. denied,* 369 U.S. 828 (1962). Instead, the Court of Appeals narrowly construed the District Court's findings[31] in order to justify the use of an erroneous theory of law to overturn the judgment.

---

[28] M. J. Norris, THE LAW OF SEAMEN (3rd Ed.), §695 at page 414.

[29] App. at page 41.

[30] App. at page 54.

[31] "The lower Court clearly reasoned that Terry was negligent in turning on the power *even if* he was ordered by Williams to do so." *Williams,* 497 F.2d at 72; App. at page 62.

In holding that the findings of the District Court were not sufficient to establish that Brasea had failed to carry its burden of proof, the opinion of the Court of Appeals is in conflict with the decisions of those Courts of Appeals which have held that the failure to make a finding on a particular fact will be assumed to be a finding against the party having the burden of proof. *Switzer Bros., Inc. v. Locklin,* 297 F.2d 39, 45 (7th Cir. 1961), *cert. denied,* 369 U.S. 851 (1962); *Burkhard v. Burkhard,* 175 F.2d 593, 596 (10th Cir. 1949); *Shoiler v. Secretary of State of United States,* 175 F.2d 402, 403 (7th Cir. 1949); *Woods v. Turner,* 172 F.2d 313, 315 (10th Cir. 1949); *Shapiro v. Rubens,* 166 F.2d 659 (7th Cir. 1948); *Container Patents Corp. v. Stant,* 143 F.2d 170, 172 (7th Cir. 1944), *cert. denied,* 323 U.S. 734 (1944). In 1966, the Court of Appeals for the Fifth Circuit in a maritime tort action held that ". . . all facts not embraced in the specific findings [of the trial court] should be regarded as not proved by the party having the burden of proof." *China Union Lines, Ltd. v. A. O. Andersen & Co.,* 364 F.2d 769, 790 (5th Cir. 1966), *cert. denied,* 386 U.S. 933 (1967), *reh. denied,* 386 U.S. 999 (1967).

Whether Williams did or did not instruct Terry to turn on the power was ultimately a defensive issue, to be considered in determining whether Williams was guilty of comparative negligence. On this issue, the burden of proof was on Brasea.[32] In determining this issue, the District Court not only refused to find that Williams gave such an instruction to Terry, it specifically stated that "[t]he Court is not prepared to find that Plaintiff gave Terry specific instructions to turn on the power, but, in any event, the Court finds that Plaintiff disregarded existing danger and that his own fault contributed forty percent (40%) to his injuries."[33] In holding that Terry could not be held negligent without an additional finding that Terry acted without a direct order, the Court of Appeals improperly shifted the burden of proof on this issue from Brasea to Williams, after the District Court had specifically refused to find that Williams had given such an order. The effect of this holding is to require Jones Act seamen to prove they did not assume the risk of injury in addition to proving duty, negligence and causal relationship as a prerequisite to establishing negligence imputable to the shipowner-employer. Such a rule is contrary to the prior decisions of this Court in interpreting the quantum of negligence required to impose liability under the Act.

---

[32] M. J. Norris, THE LAW OF SEAMAN (3rd Ed. 1970), §688 at page 370.

Under the Jones Act a shipowner is liable for injuries to a seaman resulting in whole or in part from the negligence of another employee. *Johnson v. United States,* 333 U.S. 46, 49 (1948). This is true whether such negligence is mere inadvertence or malicious bodily assault. *Jamison v. ENCARNACION,* 281 U.S. 635, 641 (1930). The negligence or fault that consists of a breach of duty of care under the FELA and the Jones Act is not the same as at common law. *Kernan v. American Dredging Co.,* 355 U.S. 426, 432 (1958). In some instances, the Jones Act duty of the shipowner has been held to be greater, and the quantum of proof necessary to establish negligence less than under the FELA. *Schulz v. Pennsylvania R.R. Co.,* 350 U.S. 523 (1956); *Johnson v. United States,* 333 U.S. 46 (1948); *Cortes v. Baltimore*

---

[33] App. at page 49. The Court of Appeals correctly determined that the District Court erred in finding Williams contributorily negligent for failing to foresee that Terry would turn on the power without instructions. *Williams,* 497 F.2d at 74; App. at pages 65-66.

Insular Line, 287 U.S. 367 (1932). In any event, this Court has held that the standard of liability under the Jones Act in jury cases is whether the proofs justify within reason the conclusion that employer negligence played any part, *even the slightest,* in producing the injury for which damages are sought. *Ferguson v. Moore-McCormack Lines,* 352 U.S. 521, 523 (1957).

The Court of Appeals justified its holding in two steps. First, by disregarding the findings of the District Court, *sine qua non,* and adopting in their stead, Terry's testimony that Williams' hands were not visible to him because they were somehow obscured by a ten inch cathead, even though the two were standing only two feet apart and Terry was on an elevated platform looking down on Williams.[34] In this the Court of Appeals exceeded the permissible scope of review permitted by Rule 52(a), Federal Rules of Civil Procedure. *McAllister v. United States,* 348 U.S. 19, 20 (1952). Secondly, it held as a matter of law that the discipline required on a three-man, seventy-eight foot shrimp trawler, fishing on shares, in a non-emergency situation, dictates that when the master gives an instruction[35] to turn on the winch, the winch operator must instantly obey and execute without making any reasonable effort to ascertain whether the master is in danger, *even though he knows at the time that the master is attempting to untangle a line on the cathead with his hands.*

In drawing a fine line of discrimination between "master" and "crew member" as a basis for determining the liability of a shipowner under the Jones Act, the decision of the Court of Appeals is contrary to both the purpose of that Act and the decisions of this Court. In *Warner v. Goltra,* 293 U.S. 155 (1934), this Court abolished the distinctions between masters and crew members in negligence actions brought under the Jones Act. In that case, the master of a tugboat had been killed through the negligence of a pilot employed to navigate the tug. *Id.,* at 156. The Missouri Supreme Court held that a "master" was not a "seaman" under the Jones Act because of the statutory distinction encompassed in 46 U.S.C. § 713 and because any negligence on the part of the pilot occurred while the master was in overall command of the vessel. *Warner v. Goltra,* 67 S.W.2d 47, 49 (Mo.Sup. 1933). In reversing, this Court held that the scope of the class of seamen at other times and in other contexts was not significant. "Our concern is to define the meaning [of 'seaman'] for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained." 293 U.S. at 158. Although for other purposes there are, out of necessity, valid reasons for discrimination between masters and seamen, "[i]t is neither rational nor just if extended to remedies for bodily wounds. At such times masters and seamen are approximately equal." 293 U.S. at 162. Since that decision, this Court has never recognized a distinction between classes of "seamen" as being sufficient to relieve employers of liability from a failure to exercise reasonable care for the safety of others under the Jones Act.

---

[34] *See* App. at pages 91, 92 and 93.

[35] As referred to by the District Court. Only in the opinion of the Court of Appeals is the term "order" found.

The fact that a seaman may not be held contributorily negligent for carrying out orders that result in his own injury has nothing to do with whether Terry's conduct constituted negligence imputable to Brasea. It is clear that under the Jones Act, a crew member does not assume the risk of injury in carrying out an order, nor does a master assume the risk of injury brought about by the negligence of a fellow employee. *BOAT DAGNY, Inc. v. Todd,* 224 F.2d 208 (1st Cir. 1955). But the issue in point is not assumption of risk or contributory negligence, but whether Terry's negligence played any part, even the slightest, in producing Williams' injuries. *See Ferguson v. Moore-McCormack Lines, Inc.,* 352 U.S. 521, 522-523 (1957). Whether Williams instructed Terry to turn on the power was a question of fact to be determined by the District Court in considering the issue of comparative negligence. This issue was raised by Brasea relying solely on Terry's testimony, was duly considered by the District Court and rejected.

Williams met his burden of proving Terry's negligence under the Jones Act. The District Court made sufficient findings to sustain its conclusions of law in this regard. Because the decision of the Court of Appeals requires an additional burden of proof on this issue that is tantamount to requiring Williams to negate that he assumed the risk of injury, it is inimical to the intent and prior constructions of the Jones Act and warrants this Court's review.

SUMMARY

Whether a ship's equipment and rigging is in such condition that it renders the vessel unseaworthy is a question of fact which, when made by the District Court, is controlling unless shown to be clearly erroneous within the limits of review imposed by Rule 52(a), Federal Rules of Civil Procedure. The duty of the shipowner to provide a seaworthy vessel arises out of and is solely determined by application of the general maritime law. The liability imposed by a breach of that duty is totally and absolutely divorced from negligence-encrusted concepts of contributory negligence, assumption of risk, foreseeability, or the conduct of a fellow servant. In determining Petitioner's claim for unseaworthiness to be "moot" because he "fails to establish liability under the theory [of strict product liability]", the decision of the Court of Appeals is a radical and unwarranted departure from established admiralty law and procedure and will, if allowed to stand, virtually eliminate the duty to provide a seaworthy vessel by subjecting seamen to assume the risk of being injured by defectively designed and manufactured ship's equipment in addition to the normal hazards and perils attendant to their profession.

The rights of seamen injured on vessels operating on navigable waters has consistently been determined by standards peculiar to the general maritime law. That law has been influenced over the years by common law concepts. Often, as in the case of the Jones Act, survivors' rights in death actions, and actions such as this, involving the defective design and manufacture of ship's equipment, the maritime law has incorporated common law remedies that were not previously considered to be available in admiralty. However, the extent to which non-maritime concepts apply and operate within the admiralty framework involves a selective process which adopts only those rights and duties which are in harmony with existing maritime law and rejects those which are not. The purpose of this selective procedure is twofold: to afford all seamen a similar measure of protection enjoyed by those employed in non-maritime industry and to achieve uniformity in the application and operation of admiralty law. In determining Petitioner's claims against CMC and Bender without regard to the general maritime law, the decision of the Court of Appeals deprives seamen injured at sea as a result of defectively designed or manufactured ship's appliances of their traditional right to have such claims determined by the well-settled standards peculiar to the general maritime law. Instead, it subjects them to the uncertainty of having such claims determined by standards of the common law that are not yet uniformly and consistently accepted or applied.

In remanding this case to the District Court for an additional finding as to whether Petitioner instructed Terry to turn on the power, the decision of the Court of Appeals not only expands the permissible scope of appellate review beyond the perimeters set by Rule 52(a), Federal Rules of Civil Procedure, but also subjects seaman under the Jones Act to an additional, and heretofore unknown, burden of proving that their conduct did not constitute contributory negligence or an assumption of the risk of injury as a prerequisite to determining whether a fellow crewman's negligence was a proximate cause of those injuries. Finally, it imposes an unrealistic discrimination against masters of small fishing vessels contrary to the beneficial purposes of the Jones Act.

CONCLUSION

For the reasons set forth above, Roy C. Williams prays that this Court enter its Order directing that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit herein and upon such review that this Court Order the remand of this case to the United States District Court for the Southern District of Texas with instructions to enter judgment in favor of Petitioner and against Respondents Brasea, Inc., Bender Welding and Machine Company and Construction Machinery Company, *in personam* and the CIAPESC I, *in rem,* in the amount of Five Hundred

Twenty-Seven Thousand Five Hundred Dollars ($527,500.00), together with all taxable costs both in this Court and in the Courts below, with legal interest from the date of judgment.

Respectfully submitted,

ROY C. WILLIAMS, *Petitioner*

By: ____________________________
J. ROBERT MCKISSICK
WILLIAM R. EDWARDS

LAW OFFICES OF WILLIAM R. EDWARDS
400 Wilson Tower
Corpus Christi, Texas 78403

CLEVELAND & SHAABER
Barnett First National Bank
Jacksonville, Florida

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari have been deposited with the United States Postal Service, with proper first-class postage affixed thereto, certified mail, return receipt requested, addressed to each of the following counsel for Respondents: Mr. Charles D. Kennedy, Suite 3710, One Shell Plaza, Houston, Texas 77002, Mr. Jack G. Carinhas, Jr., 910 E. Levee Street, Brownsville, Texas, Mr. A. J. Watkins, 443 The Main Building, Houston, Texas 77002 and Mr. M. W. Meredith, P. O. Box 2768, Corpus Christi, Texas 78403 on this the 6th day of August, 1975.

____
J. ROBERT MCKISSICK
LAW OFFICES OF WILLIAM R. EDWARDS
400 Wilson Tower
Corpus Christi, Texas 78403

APPENDIX A

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CIVIL ACTION NO. 69—C—213

Admiralty or Maritime Claim Within
the Meaning of Rule 9(h)

ROY LEWIS C. WILLIAMS

v.

BRASEA, INC., ETC., ET AL

(Filed April 24, 1972)

MEMORANDUM AND ORDER

The Plaintiff Williams, captain of the CIAPESC I, a fishing vessel, was injured while the vessel was fishing in the Gulf off the Texas coast. His injuries were very disabling. Both his arms were broken so severely that his left arm was amputated at the shoulder and the right arm just below the elbow.

The CIAPESC I was built by Defendant Bender Welding and Machine Company (sometimes called Bender) and was sold to Defendant Brasea, Inc., in the ordinary course of Bender's business. In constructing the vessel, Bender had installed a winch, of which the port cathead was a component part. This winch, designated as Model Sx-3r, was designed and manufactured by Defendant Construction Machinery Company (sometimes referred to as CMC) and sold directly to Bender. Bender also installed on the vessel the engine and power takeoff equipment which operated the winch, constructed a snatch-block frame which was above the winch, but Bender did not rig the vessel. There was installed a rod with a handle on it, as part of the engine and power takeoff equipment. To use the handle, one of the crewmen had to stand on a low platform in front of the winch and between the catheads and reach over the catheads and above the winch. The rod was pushed in to activate the winch and pulled out to cut it off. No substantial change had occurred or modifications made in said winch, the port cathead, or the machinery related to the operation of the cathead, or in the snatch-block frame from the date of the delivery of the vessel to Brasea until the time Plaintiff suffered said injuries.

This case was tried without a jury and the Court's problem is to determine what caused the injury and, if parties other than the Plaintiff were at fault, how much money is the Plaintiff entitled to recover.

The winch was in operation immediately prior to the incident causing Plaintiff's injuries. It was being used to pull in the nets, and the line, a rope about one inch in diameter, became tangled on the port cathead. The power was turned off and the cathead had stopped moving when Captain Williams commenced trying to untangle the line. Plaintiff was using both hands to work with the line when the power came on and the cathead commenced to turn. Plaintiff's hands became entangled in the line and, although the power was immediately shut off, the cathead continued to turn for several revolutions and Plaintiff was flipped around until it stopped.

The acts above mentioned are uncontradicted. The Court, in determining what caused the injury, must resolve the conflicts existing as to other facts. Terry, a deckhand on the CIAPESC I, testified that Williams told him to turn on the power and he followed this instruction by reaching over and pushing in the rod. Williams denies giving such instruction and Rico, another deckhand, did not hear it. Terry testified he thought Williams was in the clear when the motor started, but there is no convincing proof that Terry made any reasonable effort to be sure. In any event, there is little doubt that Terry started the engine. He was standing between the catheads, just a couple of feet from Plaintiff, and knew he was trying to untangle the line with his hands. Whether Plaintiff told him to do so or not, when Terry turned on the power without making a reasonable effort to be sure Plaintiff was clear of danger, he was negligent, and thus the Defendant Brasea, Inc., was actively at fault. As soon as he realized Williams' hands were caught, Terry shut off the power, but the cathead continued to turn. If the power had not come on, Williams probably would still be fishing today. This negligence was a proximate cause of Plaintiff's injuries.

But, such negligence was not necessarily the only cause of the injury. Rope lines being hauled aboard shrimp

BLURRED COPY

vessels, generally via a cathead, will sometimes tangle, and experienced seamen are aware of this. The fact that the rope tangled and Plaintiff was injured is not in itself enough to warrant a finding of strict liability or of negligence on the part of any of the Defendants. *Helene Curtis Industries, Inc. v. Pruitt,* 385 F.2d 841. So, the Court must determine what caused the rope to tangle in the first place. In determining this fault, if any, in the cathead, Plaintiff's Exhibits 13, 14 and 16, and the testimony directly related thereto, will be disregarded.

Since the rope tangled on the port cathead, we will start with it. Was there a fault in the configuration of the cathead which was responsible for the tangling of the rope, thus starting the chain of events resulting eventually in Plaintiff's injuries? There is ample evidence that the cathead and the other equipment on the vessel had been reasonably well maintained and kept in good repair. Except for normal deterioration, the cathead was in the same condition as when manufactured and installed on the vessel.

Counsel has furnished the Court with a transcript of the testimony of witness Koloc, with references to page and line of certain portions of such testimony. The Court appreciated this courtesy and it was very helpful. However, the testimony regarding the slant of the inside of the flange and the reduction of the radius of the curve as it merges into the throat of the spool from two inches to one-half inch, and the imperceptible taper of the spool, consisted of many speculative questions and answers, and the various exhibits in evidence did not remove the speculation. The Court concludes that Plaintiff failed to prove the cathead was not reasonably suited for the purposes for which it was intended. Even if there was sufficient evidence to make a prima facie case, which the Court doubts, it was not convincing. Even if there was "guesswork" involved in manufacturing, and the configuration of the finished product was different than shown on the drawings, this would be pertinent only after the Court was satisfied the configuration was faulty. The presumption of adverse testimony, if applicable at all, was not strong enough to overcome the weakness of the Plaintiff's case as to this issue.

The Plaintiff also complains that CMC designed the winch without providing a braking mechanism to stop the revolving cathead when an emergency such as existed here arises. There was no uncertainty in the evidence as to this. It is undisputed that the port cathead on the winch will continue to revolve several times after the power to the winch is cut off, and that, if the rope becomes tangled, further revolutions of the cathead would increase and tighten the tangle. It is also undisputed that the injuries to Plaintiff were greatly aggravated by the continued revolving of the cathead after Plaintiff's hands were caught in the rope. And, there is no reason why an adequate braking mechanism for the cathead could not be provided. It seems to the Court, under the circumstances in this case, if there had been proper application of a braking mechanism on the port cathead, the tangle might have been easily disentangled and Plaintiff might not have been injured, but there is no way to tell for sure about that. The evidence does indicate that the additional turns of the cathead, after the first or perhaps even after the second, were responsible for Plaintiff's loss of both arms, and the Court is satisfied that, if the cathead had been stopped after the first or second turn, Plaintiff's injuries would not have been so severe.

BLURRED COPY

Therefore, the Court finds that the failure on the part of CMC to provide an adequate braking mechanism for the port cathead rendered the same defective and unreasonably dangerous to persons situated as was Plaintiff, and, therefore, it was not reasonably suited for the purpose for which it was intended; and, further, that the absence of an adequate brake was a producing cause of injuries to Plaintiff.

The Defendant Bender Welding and Machine Co., Inc., in the construction of the vessel CIAPESC I, installed the winch and also provided a snatch-block frame above the winch. Plaintiff contends the snatch-block frame did not provide a fair lead from the snatch block to the port cathead. "Fair lead" refers to the angle at which a rope line runs from the snatch block to the cathead. This angle is determined by the relationship of the snatch-block frame and the throat of the cathead. The rope line used in pulling in the nets runs up through the rigging and down to the snatch-block frame and through the snatch block, and from there to the port cathead. The evidence proved, to the satisfaction of the Court, that the snatch-block frame was too far forward and thus there was not a fair lead from the snatch block to the port cathead. The improperly located snatch-block frame and the resulting absence of a fair lead caused the line to tangle on the port cathead. Also, the winch was installed so that it slanted down toward the stern of CIAPESC I, which may have contributed to the lack of a fair lead. Therefore, the Court finds the placement of the snatch-block frame by Bender was such as to make the vessel, and particularly the area in front of and near the winch, unreasonably dangerous to uses thereof, and thus it was not reasonably suited for the purpose for which it was intended;

and such installation was a producing cause of the incident in which Plaintiff was seriously injured.

There was some testimony with regard to a shackle between the snatch-block frame and the snatch block, but the evidence was uncertain with regard to this and it did not establish to the satisfaction of the Court that the shackle did any more than contribute to the fair-lead problem, if it did anything, and its presence does not change the findings of the Court with regard to the lack of a fair lead from the snatch-block frame down to the port cathead on the winch. The Court finds the fair-lead problem would have been the same without the shackle. However, this is a matter of unseaworthiness which will be discussed later.

With regard to the negligence of both Construction Machinery Company and Bender Welding and Machine Co., Inc., the Court is not satisfied that the evidence charges either Defendant with any negligent fault which was the proximate cause of Plaintiff's injuries. Under the theory of strict liability, a defective condition created by a Defendant which was a producing cause of an injury is sufficient. *C.A. Hoover and Son v. O. M. Franklin Serum Company,* 444 S.W.2d 596 (1969); and *Putman v. Erie City Manufacturing Company,* 338 F.2d 911 (5 Cir., 1964). This is not so as to negligence.

It was established that winches powered as the one here involved do not usually have separate braking mechanisms on the catheads, particularly on shrimping vessels, and that there is no proof in the record of any history of serious injuries resulting from the absence of such braking mechanism. There was a lack of convincing proof that the braking system was needed under any circumstances other than those which occurred in this case.

BLURRED COPY

There is no negligence on the part of CMC unless it failed to use ordinary care in the design and manufacture of the winch and cathead. Cain v. George, 411 F.2d 572 (5 Cir., 1969). The Court finds CMC did not fail to use ordinary care in designing and manufacturing said winch without a separate brake on the port cathead.

Bender Welding and Machine Co., Inc., was not negligent in installing the winch purchased from CMC in CIAPESC I, nor in the placing of the snatch-block frame where it did. Although it was not properly placed and thus subjected Bender to strict liability, when the activities of Bender are measured against ordinary care, the evidence is not convincing that it was negligent; thus, the Court finds Defendant Bender was not negligent in placing the snatch-block frame as it did in the construction of the vessel.

The foregoing findings and conclusions of the Court relate to the liability of Defendants Bender and CMC to Plaintiff. We have already found the negligence of seaman Terry in turning on the power was active negligence for which Defendant Brasea, Inc., is responsible. Defendant Brasea, Inc., has other liability in this case. The snatch-block frame was improperly placed and Defendant Brasea, Inc., did not make proper use of shackles to remedy this defect. The port cathead had no independent braking mechanism. The rod used to turn on the power to the winch and turn it off was over the winch and not easy to reach. Consequently, at the time the rope line bringing in the nets was tangled on the port cathead, the vessel, and particularly the area in front of the winch, was not reasonably suitable for its intended use and thus unseaworthy. *Gibbs v. Kiesel,* 382 F.2d 917 (5 Cir., 1967).

Now that the responsibility of the several Defendants has been determined, The Court must now resolve the amount of the money damages resulting from Plaintiff's injuries. Maintenance and cure are not here involved, but loss of wages, loss of physical capacity other than earning a living, and pain and mental anguish are certainly serious problems.

At the time of the trial, the Plaintiff's physical wounds had healed, but he had not yet learned how to use any prothesis. The evidence established his work-life expectancy at twenty-six years, and his actual life expectancy at thirty years. He is a person with a limited sixth-grade education and has spent most of his life as a seaman, working mainly on shrimp boats. He has been serving as a captain of a shrimp boat for some time. It is customary in the shrimping industry that the captain and his crew are paid based on a percentage of the haul, so the Plaintiff's income would naturally vary from year to year. There was some conflict in the testimony with regard to the income of the Plaintiff, and there is no way to figure it accurately, but considering what information the Court has, it finds that from the time of the injury to the time of trial, the Plaintiff lost wages of $10,500.00; and the amount of money, if paid now, which will compensate him for his loss of earnings in the future is $142,500.00.

In determining the amount necessary to compensate him for his physical incapacity from the date of the injury to the time of trial, we must take into account that he was taken care of at no expense to him for a considerable time after the injury. The Court finds this amount to be $5,000.00; and, in determining the amount of money necessary to compensate him for his future physical incapacity, other than wages, we must take into account the cost of the assistance he will need. Of course, it is possible that he may be able to develop the ability to use artificial limbs, but the use of such prothesis will be exceedingly limited. The Court finds the amount of money, if paid now, which will compensate Plaintiff for his future physical incapacity for the remainder of his life is $109,500.00.

The physical pain and suffering which the Plaintiff underwent at the time of the accident and subsequent thereto until his wounds healed must have been severe, and the mental anguish which he suffered as a result of such injuries up to the time of trial must have been extreme. There is no indication Plaintiff will suffer physical pain to any great extent in the future, but he will, for the rest of his life, be limited in his ability to take care of himself. The proof indicates that by diligence Plaintiff could manipulate artificial devices to the extent of taking care of a number of common personal chores, and thus relieve him of some anxiety. Nevertheless, and taking into account a reasonably proficient use of artificial limbs, the mental anguish incident to living like that must be tremendous. To know what physical pain and this sort of mental anguish is worth in dollars and cents is exceedingly difficult; there is no accurate way to measure it. The Court finds that the damages for physical pain and mental anguish suffered by Plaintiff to time of trial to be $135,000.00; and the physical pain and mental anguish which will be suffered by Plaintiff in the future and for the rest of his life to be $125,000.00.

The Court has recognized the severity of Plaintiff's injuries. The total damages suffered by Plaintiff because of his injuries are $527,500.00. All of the Defendants have some responsibility in this regard, but so does the Plaintiff. He took the hard way, a dangerous way, in trying to untangle the rope at a time when a crew member was close to the rod which had only to be pushed in to start the power and thus turn the cathead, and he should have known better. He disregarded the existing danger, when, if careful, he could have avoided being caught by the tangled rope, when the rod was pushed in. The Court is not prepared to find that Plaintiff gave Terry specific instructions to turn on the power, but, in any event, the Court finds that Plaintiff disregarded existing danger and that his own fault contributed forty percent (40%) to his injuries. The question of whether this Court may reduce Plaintiff's recovery by deduction of the percentage of his fault has been raised. Nevertheless, the Court has taken Plaintiff's fault into account, and thus, his recovery is the sum of $316,500.00.

In considering if Plaintiff's fault should be taken into account, which is, in effect, apply comparative negligence, the Court considered the case of *Texsun Feed Yards, Inc. v. Ralston Purina Co.*, 447 F.2d 660 (5 Cir., 1971). It involved a cause of action arising within the State of Texas, and it holds that, under the facts related in the opinion, contributory negligence will not defeat recovery in a suit based upon a theory of products liability, even though negligence of the defendant is also claimed in the same suit; and, that the contributory negligence of the Plaintiff was not related to the actions of the Defendant. *Texsun Feed Yards* was a civil diversity action totally unrelated to admiralty and the decision was based on the law of products liability in Texas. This Court does not consider it as authority for denying the Defendants here the reasonable protection of the rule of comparative negligence.

This Court is here concerned with an admiralty suit brought under Rule 9(h). The Plaintiff, as in *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 409-411, "was injured on navigable waters while working on a ship * * *. Consequently, the basis of [his] action is a martime tort * * *." Thus Federal maritime law is controlling and the rule of comparative negligence should apply. While in *Pope & Talbot* the Supreme Court was concerned with the repudiation of contributory negligence as a complete bar to a plaintiff's recovery in an admiralty case, the reasoning of the Court in that case is certainly applicable here.

Further, since the liability of the ship owner for breach of warranty of seaworthiness is analogous to the liability of a manufacturer or seller for the breach of warrant for fitness, *Grigsby v. Coastal Marine Service of Texas, Inc.,* 412 F.2d 1011 (5 Cir., 1969), the refusal to apply comparative negligence to all phases of this case would create a most confusing situation. The faults of Bender and CMC, as heretofore outlined, are the same faults which caused Defendant Brasea, Inc., to afford to Plaintiff an unseaworthy vessel. To put it another way, all Defendants are at fault for the same reasons, and certainly, in admiralty, and if the facts justify it, comparative negligence is properly an offset to any damages Plaintiff suffered because of the unseaworthiness of the vessel, and so it should be as to the products liability claim pursued by Plaintiff herein.

The final matter for decision concerns claims for indemnity. Although all of the Defendants are jointly and severally liable to the Plaintiff, each Defendant is asking for indemnity from another Defendant. The Court must finally resolve this issue between the Defendants, as prayed for in their respective cross-actions.

On an active-passive tort theory of indemnity, Defendant Construction Machinery Company and Defendant Bender Welding and Machine Company, which are only passive participants by virtue of their strict liability in tort, may very well have a claim over against Defendant Brasea, Inc., the owner of the vessel, due to the active negligence of Terry, the employee of Brasea, in starting the winch engine before making a reasonable effort to see that Plaintiff was clear of the cathead. *Tri-State Oil Tool Industry, Inc. v. Delta Marine Drill. Co.,* 410 F.2d 178 (1969).

On the other hand, Brasea, Inc., may very well be entitled to recover over against Bender, based upon a contractual indemnity theory arising from Bender's failure to provide a snatch-block frame reasonably suitable for its intended use, *Grigsby v. Coastal Marine Service of Texas, Inc.,* supra, and against CMC, because of its implied warranty of the fitness of the port cathead for the use intended which CMC breached when it failed to provide adequate braking facilities. *Grigsby, Id.*

This Court has been furnished with excellent briefs by all counsel, but, even so, the Court concludes there is little maritime authority to help solve the dilemma pointed up by the alternatives just discussed. However, *South Austin Drive-In Theatre v. Thomison,* 421 S.W.2d 933, writ ref., n.r.e. (1967), is sufficiently analogous to warrant our consideration of the reasoning in the opinion.

In that case, a manufacturer breached its duty to design a power mower reasonably suited for the purpose intended. The operator of the mower, who was the employee of the defendant seeking indemnity from the manufacturer, negligently reversed the mower and thereby caused injury to the plaintiff. Faced with cross-actions for indemnity, the Texas court held:

> "We believe that the negligence of . . . [defendant-employer] . . . places the [defendant-employer] *in pari delicto* with [the defendant-manufacturer]. Since the [defendant-employer] and [defendant-manufacturer] were concurrent or joint tortfeasors, having no relation to one another, each of them owing the same duty to [plaintiff], and involved in an accident in which the injury occurred without breach of duty to each other, no right of indemnity exists on behalf of either against the other." Id., at 949.

The Court is satisfied that the reasoning of the Texas court will produce a just result as to Defendants before this Court and concludes that CMC and Bender together were *in pari delicto* with Brasea. Also, the Court believes that CMC and Bender were *in pari delicto* with each other. The final result of all the various actions for indemnity is a stalemate. No indemnity will be awarded as between any of the three Defendants.

The foregoing constitutes the findings of fact and the conclusions of law of the Court in this case. The Clerk shall furnish all counsel with copies of this memorandum and order. The Court will prepare its own judgment herein.

Signed this 24th day of April, 1972.

OWEN D. COX
United States District Judge

APPENDIX B

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CIVIL ACTION NO. 69-C-213

ROY LEWIS C. WILLIAMS

V.

BRASEA, INC., ET AL

Admiralty or Maritime Claim Within the
Meaning of Rule 9(h)

(Filed June 5, 1972)

AMENDED FINAL DECREE

This cause was tried before the Court, with all parties present and represented by counsel, and the Court made its findings of fact and conclusions of law, and same were incorporated in its Memorandum and Order filed on the 24th day of April, 1972. Pursuant to said findings of fact and conclusions of law, it is hereby ORDERED, ADJUDGED and DECREED by the Court,

(1) That Plaintiff, Roy C. Lewis Williams, do have and recover of and from the Defendants, Brasea, Inc., Bender Welding and Machine Company, and Construction Machinery Company, the sum of Three Hundred Sixteen Thousand Five Hundred Dollars ($316,500.00):

> (A) Defendant Brasea, Inc., shall be primarily liable for 33⅓% of the sum of Three Hundred Sixteen Thousand Five Hundred Dollars ($316,500.00), i.e., One Hundred Five Thousand Five Hundred Dollars ($105,500.00), and secondarily liable to Plaintiff Williams for the sum of Two Hundred Eleven Thousand Dollars ($211,000.00);
>
> (B) Defendant Bender Welding and Machine Company shall be primarily liable for 33⅓% of the sum of Three Hundred Sixteen Thousand Five Hundred Dollars ($316,500.00), i.e., One Hundred Five Thousand Five Hundred Dollars ($105,500.00), and secondarily liable to Plaintiff Williams for the sum of Two Hundred Eleven Thousand Dollars ($211,000.00); and
>
> (C) Defendant Construction Machinery Company shall be primarily liable for 33⅓% of the sum of Three Hundred Sixteen Thousand Five Hundred Dollars ($316,500.00), i.e., One Hundred Five Thousand Five Hundred Dollars ($105,500.00), and secondarily liable to Plaintiff Williams for the sum of Two Hundred Eleven Thousand Dollars ($211,000.00).

(2) That Brasea, Inc., as a cross-plaintiff, take nothing by its cross-action herein for indemnity from and against cross-defendants Bender Welding and Machine Company and Construction Machinery Company;

(3) That Defendant Bender Welding and Machine Company, as cross-plaintiff, take nothing by its cross-action herein for indemnity from and against cross-defendant Construction Machinery Company;

(4) That Defendant Construction Machinery Company, as cross-plaintiff, take nothing by its cross-action for indemnity from and against cross-Defendant Bender Welding and Machine Company;

(5) That Plaintiff shall have his costs of action; and

(6) That Plaintiff shall have interest on this judgment at the rate of six percent (6%) per annum from April 24, 1972, until paid.

Signed this 2nd day of June, 1972.

OWEN D. COX
United States District Judge

APPENDIX C

ROY C. WILLIAMS,
Plaintiff-Appellant-Cross Appellee,

v.

BRASEA, INC., and VESSEL CIAPESC I, her engines, etc., Defendants-Appellees-Cross Appellant,

Bender Welding & Machine Co., Inc., Defendant-Appellee-Cross Appellant,

Construction Machinery Company, Defendant-Appellee-Cross Appellant.

No. 72-3623.

United States Court of Appeals,
Fifth Circuit.

July 5, 1974.

Appeal from the United States District Court for the Southern District of Texas.

Before GEWIN, THORNBERRY and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge:

The shrimp trawler CIAPESC I, out of Freeport, Texas was trawling for shrimp in the Gulf of Mexico, when the events leading to this involved lawsuit took place. Roy C. Williams, the plaintiff below and appellant (and cross-appellee) here, was master of the CIAPESC I at the time he was seriously injured aboard the vessel. Williams prevailed below in this action against the owner of the vessel, Brasea, Inc. (Brasea), its builder Bender Welding and Machine Company, Inc. (Bender), and the designer- manufacturer Construction Machinery Company (CMC), of the winch assembly involved in the accident. As to Brasea the action was premised upon unseaworthiness of the CIAPESC I and negligence under the Jones Act, Title 46, U.S.C. Sec. 688. Bender and CMC were sued on theories of negligence and products liability. Brasea cross-claimed for a right of indemnity as against Bender and CMC, and Bender cross-claimed for indemnity from CMC.

The several claims and cross-claims were tried together to the district court without a jury. Final judgment was entered for Williams in the sum of $316,500, which was reduced from a finding of damages in the amount of $527,500, by 40% ($211,000.00), the proportion of damages the court found to represent Williams' contributory negligence. Liability was found as to Brasea based on the negligence of employee Terry, a crewman aboard the vessel, and unseaworthiness of the CIAPESC I. Bender and CMC were found liable on the theory of products liability set forth in the Restatement of Torts 2d, Sec. 402A. Both Bender and CMC were further found not to have been negligent, and both cross-claims for indemnity were denied. By amendment to the final judgment, the liability found was changed from joint and several against the defendants to primary-secondary. Williams gave timely notice of appeal and all defendants filed cross-appeals. After review of the briefs, record, and argument we remand for further findings in connection with the negligence issues and reverse on the issue of products liability.

I. FACTS

On December 10, 1969, the CIAPESC I was trawling for shrimp in the Gulf of Mexico off the Texas coast. Aboard were Williams, master of the vessel, and two crewmen, Edward Terry and Jeremiah Richo. The accident involved a power winch designed and manufactured by CMC and installed by Bender during the ship's construction. The winch had three drums which revolved when power was supplied to the winch. Two machined steel winch heads, called "catheads", were attached to and extended from the drums. Catheads resemble large empty spools perhaps a foot high and of somewhat smaller diameter. Their function largely is to assist in pulling "whiplines", a whipline being a line attached to a shrimp net and run thence through a block and tackle down to the deck of the ship from the A-frame boom which supports it. By wrapping the loose end of the whipline around the cathead and engag[illegible] the power, a crewman uses the rotation of the cat[illegible] pull the net alongside the vessel and from there [illegible] the water and up to the deck.

There were two catheads on board the CIAPESC I. A push-pull handle for engaging the power to the winch, and thus the catheads, was located between the two. A low platform on which to stand in front of the handle facilitated reaching it. On the day in question, with both port and starboard nets out, in the 25-fathom area, they hit a "bad bottom" and Williams, the master, ordered the crew to pick up the nets. As the port net was being retrieved the whipline running from the net through the snatch block to and around the cathead became tangled around the cathead. Terry cut the power to the cathead and Williams, who had been below, came on deck to see what had happened. Recognizing the problem, he instructed Terry to pull on the line in order to create some slack. Williams then began untangling the line around the cathead with his hands.

From all the testimony it appears that, at this precise moment, Terry was standing on the platform in front of the on-off power handle, between the two catheads. Williams was on the other side of the cathead on which the line was tangled, perhaps two feet away. Richo was about six feet away, but was not watching Terry or Williams. A factual dispute exists with respect to what immediately ensued. Terry testified that Williams ordered him to cut on the power of the winch and he did so. Williams denied giving any such order. Richo did not hear anything, but that fact is by no means conclusive, because he was not paying attention and because extraneous noises existed at the time.

When the power came on the cathead began to turn and the line quickly became taut. Williams' left hand caught in the line on the cathead and he yelled for Terry to cut the power. The cathead continued to turn for three or four revolutions after the power was cut, as do all catheads mounted on winches that lack a brake. While trying to free himself, Williams caught his right hand in the line on the cathead and this arm was pulled further into it. He was cut loose after having been carried over the cathead several times thus entangled. The resulting injuries required the amputation of both of Williams' arms. There was further conflict in the evidence as to who actually turned the power off and whether it was before or after Richo freed Williams by cutting the line. Terry further testified that he looked at Williams just before he was ordered to turn on the power and, while he could not see his hands, he seemed to be in the clear.

II. APPEAL BY WILLIAMS

Williams appeals from several aspects of the court's final judgment. Most significant is his attack on the 40% reduction of the judgment because of his asserted contributory negligence. He first urges that he was not in fact contributorily negligent, and second that, even if he were, the court made no factual findings to support its 40% comparative negligence figure. In our view the question of Williams' contributory negligence *vel non* is inextricably tied to the issue of (a) Terry's, and (b) hence Brasea's[1] negligence. We deal first therefore with the competing negligence claims of Williams and Brasea.

The district court's memorandum-opinion and order contains two references to the dispute as to whether Williams ordered Terry to engage the power and its relevance to liability. The court initially stated that "[w]hether plaintiff told him to do so or not, when Terry turned on the power without making a reasonable effort to be sure plaintiff was clear of danger, he was negligent, . . ." App. at 1746. Later in its opinion the court observed that "[t]he Court is not prepared to find that Plaintiff gave Terry specific instructions to turn on the power, . . ." App. at 1758. The lower court clearly reasoned that Terry was negligent in turning on the power *even if* he was ordered by Williams to do so.

---

[1] While there may have been room for question at the time of trial as to whether Terry was an employee of Brasea for purposes of the latter's vicarious liability, that issue is now settled adversely to Brasea. See Bishop v. United States, 5 Cir. 1973, 476 F.2d 977.

Williams' contributory negligence was put on a different footing. There was testimony regarding alternative methods Williams might have used in an effort to untangle the line around the cathead, such as prying it loose with a Stillson wrench or simply cutting it with a knife. This was perhaps the basis of the district judge's 40% comparative negligence figure, since in his reference to the reduction he stated that "(h)e took the hard way, a dangerous way, in trying to untangle the rope . . . (h)e disregarded the existing danger, when, if careful, he could have avoided being caught by the tangled rope, when the rod was pushed in". App. at 1757.

We determine that the present findings of fact in the record will not support the trial court's legal conclusions as to negligence and contributory negligence, and accordingly remand for further factual determination consistent with the following discussion.

As noted above, the trial court declined to find whether or not Williams instructed Terry to engage the power. Williams asserts that the burden of proof on that issue rested with Brasea by reason of its allegation that Williams gave the order in support of its contributory negligence claim. From there Williams argues that, since the court made no finding, and the burden of proof was on Brasea, a failure to carry that burden below means that we must assume on appeal that the order was not given. We find that argument imaginative but unavailing. The fact that the court did not make a factual finding is the functional equivalent of not passing on whether the burden of proof was carried—not a premise from which to infer that the burden was not carried. Specifically, the district court held that Terry was negligent even if the order was given; thus that it was unnecessary to resolve the factual dispute.

On the subject of Terry's negligence, we review the record mindful that factual determinations are to be overturned only if clearly erroneous. F.R.Civ.P. 52(a). Mc-Allister v. United States, 1954, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20. This court has consistently interpreted that rule to mean that a finding of fact should not be reversed if supported by substantial evidence. Lentz v. Metropolitan Life Ins. Co., 5 Cir. 1970, 428 F.2d 36. We reiterate that the lower court concluded that Terry was negligent because he failed to make a reasonable effort to be sure that Williams was free from danger when he cut the power on *even if* Williams had ordered him to cut it on. We consider that conclusion clearly erroneous in the absence of an additional finding that Terry acted *without* a direct order.

Brasea's brief accurately demonstrates the fallacy in this finding of the lower court. The real question is whether Terry was negligent, *assuming* Williams gave the disputed order. Terry and Williams were but two feet apart, and Terry testified he observed that Williams appeared to be in the clear just as he reached for the power lever. Williams' hands were not visible to Terry, since his vision was blocked by the cathead itself. Thus, in order to exercise the level of care found lacking by the district court, Terry would have had to descend the platform, walk to the side of the cathead to observe Williams' hands, then return to the platform in order to cut on the power; and all this coming *after* receipt of a direct order from Williams to turn the power on.

While we entertain some doubt as to whether this would be negligence as between two crewmen (a question we need not consider), we have no doubt that it was not such as between the master of a vessel and a crewman. A seaman's duty to obey orders from his immediate superior overrides the postulate that the seaman must delay execution of the order until he makes a reasonable effort to be sure that following the order will not injure the superior who gave the order. On this reasoning we determine that the district court's conclusion was clearly erroneous and based on a false legal premise. Indeed, a seaman may not be contributorily negligent for carrying out orders that result in his own injury, even if he recognizes possible danger. Darlington v. National Bulk Carriers, 2 Cir. 1946, 157 F.2d 817. Terry's conduct reflects less in the way of culpability than did that of the seaman in *Darlington,* and we perceive no valid reason for holding him to a higher standard of care.

It needs emphasis here that our contrary determination on this point flows directly from the necessary assumption that Williams gave the order to turn on the power. If that assumption is dispelled upon remand by a factual determination adverse to Brasea that no such order was given, it may follow that Terry was in fact negligent. Our present holding is simply that such a finding cannot stand in the face of an assumption that Williams ordered him to turn on the power.

The clearly erroneous talisman of Rule 52(a) F.R.Civ. P. governs in considering the merits of Williams' appeal from the district court's finding that he was contributorily negligent. While his argument focuses upon events leading up to the accident, we feel that solution of this problem is inseparably linked to the issue of Terry's alleged negligence discussed above.

The district judge stated that Williams employed the most dangerous of several alternative methods for untangling the line from the cathead. This appears from study of his memorandum-opinion to be the sole undergirding for reducing the final award by 40%. As noted above, the opinion stressed that instead of using his hands, he could have pried the line loose with a Stillson wrench or crowbar, or he could have cut the line anywhere above the cathead. Williams attacks this, arguing: (1) that the alternative methods were either drastically impractical or not necessarily safer; (2) that a finding of contributory negligence cannot stand when there was a lack of proximate cause due to the intervening, unforeseeable negligence of Terry; and (3) that the district court erred in not relating how it computed the figure of 40% for reducing the final award.

The lower court did not find Williams contributorily negligent because he gave an order to turn on the power while untangling the line with his hands, but appeared rather to rely entirely on the use by Williams of his hands when other methods were available. We do not doubt that if Williams in fact ordered the power turned on, it was negligence on his part to do so when one or both of his hands were entangled in the whipline around the cathead. The difficulty arises when we assume the opposite, that he did not give the order. We proceed to an analysis of each of Williams' claims utilizing that assumption.

The first question is whether Williams' use of his hands, was contributory negligence in and of itself. The suggested alternative of cutting the line is frail indeed. According to the testimony, lines frequently tangle on catheads, and to cut one each and every time seems both impractical and demonstrative of an extraordinary rather than an ordinary and usual standard of care. But the use of a crowbar or Stillson wrench may have been a practical, viable, and safer option under the circumstances. This point seems to us so close as to require that we defer to the judgment of the trial court as not clearly erroneous.

Williams' second argument poses a more difficult question: assuming that Terry acted without an order from Williams, was his action intervening unforeseeable negligence, depriving Williams' contributory negligence of proximate causation with respect to his injury? As to this point we find Williams' argument persuasive.

While the hornbook rule advanced by Williams with respect to intervening negligence needs no citation, it is likewise not without exception: "It is not always necessary, however, to find intervening conduct specifically foreseeable. Courts have held tortfeasors responsible when their conduct threatens a particular sort of result and an unanticipated force intervenes to produce that result." Watz v. Zapata Off-Shore Co., 5 Cir. 1970, 431 F.2d 100, 116. In *Watz* a chain manufacturer sold a chain in which a link had been negligently fused and was thereby rendered weaker than it should have been. Despite negligent use by the purchaser, the damage that resulted when the link failed was found to be proximately caused by the negligent fusion of the link.

We recognize the difficulties inherent in drawing fine lines between foreseeable negligence and contributory negligence, but conclude that Williams' situation differs from that which obtained in *Watz* to the extent that *Watz* is not controlling here. The focus in *Watz* was upon the threat posed by selling a chain with a defective link. The danger was that it might fail even when used in lifting loads within its stated capacity. While abuse of the chain was not specifically foreseeable, the chain manufacturer's negligence threatened a particular sort of result, i.e. the breaking of the chain. But the same observation does not fit Williams' conduct, which did not threaten any sort of result, save the untangling of the line, until the completely unforseeable intervention of Terry's (assumed) negligence. On remand, should the district court find that Terry was not acting under Williams' order, it should conclude that Williams' negligence was not a contributing proximate cause of his injury.

We need spend a little time with Williams' assertion of error in the trial court's failure to state the underpinning for its 40% reduction of the amount of his award because of contributory negligence. This feature of the decision below falls with our reversal for further findings as to Brasea's (and Terry's) negligence and Williams' contributory negligence. If upon remand Williams is again found contributorily negligent, the percentage reduction of his award should be related to the evidence by an appropriate finding.

This analysis disposes of the most significant aspect of both Williams' and Brasea's appeals, but several other issues are raised and require consideration. Williams also attacks the trial court's modification of final judgment by which the originally found joint and several liability of the defendants was changed to primary-secondary. This was done by applying the divided damages rule, limited to maritime law, under which each tortfeasor is assessed primary liability for only his proportionate share, in this case one-third, and secondary liability as to the remainder.

See, e.g., Crain Bros., Inc. v. Wieman & Ward Co., 3 Cir. 1955, 223 F.2d 256. Williams argues that the divided damages rule is limited to collision cases and was thus improperly applied below in this case. The Supreme Court has recently ruled otherwise in Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc., et al., 1974, ____U.S.____, 94 S.Ct. 2174, 40 L.Ed.2d____ [decided May 28, 1974] where this Court's award of contribution between joint tortfeasors in a noncollision maritime case, 5 Cir., 479 F.2d 1041, was affirmed as proper under the circumstances. Cf. also Empire Seafoods v. Anderson, et al., 5 Cir. 1968, 398 F.2d 204. We determine, infra, that Bender and CMC are not liable in damages, so that the applicability of the divided damages rule need not be answered here.

Williams argues also that it was improper to reduce his judgment by 40% under the comparative negligence doctrine of maritime law as against Bender and CMC, who were found liable under a products liability theory. The argument is that since strict liability under Sec. 402A of the Restatement is not barred by contributory negligence, that negligence should not be used to effect a percentage reduction of an award premised upon a violation of that section. We recognize at least arguable merit in Williams' position, but resolution of the issue must await an appropriate case, since this point also is moot in light of our reversal of the trial court's finding of liability on the part of Bender and CMC.

Finally, Williams alleges that the district court erred by failing to enter judgment *in rem* against CIAPESC I despite the fact that the vessel was found to be unseaworthy. The point is well taken. The lower court specifically found the CIAPESC I unseaworthy, App. at 1754, and that finding is not challenged on appeal by Brasea either on brief or at oral argument. The district court on remand should make the appropriate modification of its final order.

III. BRASEA'S CROSS-APPEAL

Brasea's liability was grounded upon both the negligence of Terry, under the doctrine of *respondeat superior,* and the unseaworthiness of the CIAPESC I. On cross-appeal Brasea asserts error with respect to the lower court's finding of negligence by Terry and its denial of indemnity as against Bender and CMC. We have already dealt with the interrelated negligence issues, and ordered a remand on the subject. We turn our attention to the indemnity issues.

There is more than one string to Brasea's indemnity bow, and we will summarize each briefly. First it is argued that the indemnity principles of *Ryan*[2] should be applied in this case. *Ryan* established the now familiar doctrine that a stevedoring contractor's agreement to perform all of a shipowner's stevedoring operations necessarily includes the consensual implied obligation to stow cargo properly and safely, (now usually referred to in the cases as WWLP, or warranty of workmanlike performance), and affirmed the Second Circuit's award to the shipowner of indemnity against the stevedoring company for the amount recovered by one of the contractor's longshoremen employees for injuries sustained while unloading a ship due to improper stowage, and held that shipowner's failure to discover and correct contractor's own breach of contract could not excuse such breach. The exclusiveness of liability provision of the Longshoremen's and Harborworkers' Compensation Act, Sec. 5, 33 U.S.C. Sec. 905 was held by the Court to be no bar to the indemnity claim.

---

[2] Ryan Stevedoring Company, Inc. v. Pan-Atlantic Steamship Corp., 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133.

The inappositeness of *Ryan* to the present case is apparent. Naturally, if on remand Terry (and hence Brasea) is found to have been negligent, then the sole cause of Brasea's liability will not be the conduct of either Bender or CMC. The analogy fails for added reasons. *Ryan* was limited to a situation of contract breach, but no such obligation existed here. Most importantly, the stevedore in *Ryan* was found negligent. Bender and CMC were expressly found not to have been negligent, and we reverse, as will be seen below, Parts IV and V, the strict liability judgment. Nothing is left upon which Brasea can base an argument for indemnity flowing from contractual or quasi-contractual breach.

Brasea's second theory comes closer to the mark, but is still unavailing. The argument seeks to apply here the indemnity principles we employed in Tri-State Oil Tool Industries, Inc. v. Delta Marine Drilling Co., 5 Cir. 1969, 410 F.2d 178. In *Tri-State* indemnity was based upon a major-minor/active-passive tort theory, as opposed to the contractual theory of *Ryan*. A member of a drilling crew on board a submersible barge was injured as a result of defective equipment which had been furnished by Tri-State. Delta Drilling, whose sole liability was due to unseaworthiness because of the defective equipment, was held indemnified as the passive tortfeasor by Tri-State, whose active negligence brought about the condition of unseaworthiness.

Again, assuming that Terry is not found negligent on remand,[3] the argument still must fail. Even if Bender and CMC were liable in products liability, that is simply another form of passive tort, analogous to unseaworthiness. Thus the parties would have been in pari delicto, as the district court found. But here again, our reversal on the strict liability, Parts IV and V, leaves Bender and CMC without any, much less passive, tort liability.

Apparently anticipating the fundamental flaw in its indemnity arguments, Brasea goes on to urge that the lower court erred in finding that Bender and CMC were not negligent. While Brasea may have thought that success here would cure the defect in its indemnity theory, our discussion of that issue amply demonstrates that the claim fails, regardless. But since we reverse on the products liability issue, it is appropriate for us to address the question of possible negligence in order to determine if Bender and CMC should sustain any liability whatever in this action.

Here again we are guided by F.R.Civ.P. 52(a), and may overturn only a finding of fact which we determine to be clearly erroneous. The district court discussed the roles of Bender and CMC in the litigation, then specifically found that neither had been negligent. We find substantial evidence to support that conclusion and approve it as correct.

Two allegations with respect to CMC's negligence were considered by the lower court. First, there was a question to resolve as to whether the machined taper on the cathead would increase the likelihood of lines tangling. The district court found scant evidence for such a conclusion, after hearing from CMC engineer Koloc, who was called as an adverse witness by Williams. App. at 1748. We see no more evidence to support the allegation than did the lower court, and cannot label as erroneous its conclusion of a failure to carry the burden of proof.

---

[3] If Terry were to be found negligent, Brasea could not possibly be a "passive" tortfeasor. Contrary to its assertion to that effect on brief, vicarious liability through the doctrine of respondeat superior is not functionally equivalent to "passive" negligence. See Barrios v. Louisiana Construction Materials Co., 5 Cir. 1972, 465 F.2d 1157.

The failure of CMC to install a braking mechanism on the winch-cathead assembly was the second factor considered below. In essence, the district court concluded that it was feasible to install a brake and that its absence rendered the winch defective and unreasonably dangerous to users. However, the court also found that this did not constitute the exercise of less than the ordinary standard of care, and that no fault was attributable to CMC. App. at 1752. Support for the latter conclusion was based in part upon testimony that winches, and especially winches on shrimp boats, are practically never equipped with braking devices. CMC cannot be held to have failed to exercise ordinary care by the manufacture of a winch capable of producing injury only when used in such unusual situations as the one involved here. CMC was not shown to have departed from the required standard of care in its design, engineering and manufacture of the winch.

Brasea raises nothing to refute these conclusions. Rather, it points to the testimony of CMC engineer Koloc as proof that the winch was not properly tested prior to sale. That theory also was expressly rejected by the lower court, after consideration was given to all the relevant evidence on the point. App. at 1748. The record supports that conclusion and we discern nothing which would require reversal in this regard under the clearly erroneous standard.

The strict liability of Bender was based upon the manner in which it positioned the snatch-block frame above the cathead. This is the pulley device through which the whipline runs from the shrimp net to the cathead. Bender's error was found to be in positioning the block too far forward, thus depriving the line of a "fair lead," which refers to the angle at which a line runs from the block to the cathead. App. at 1750. This situation increases the probability of lines tangling, and a tangled line was the first in a chain of events leading to Williams' injury.

Brasea argues that this defect in positioning, together with the fact that the block was not tested *under strain,* requires a finding of negligence. But testing the line under strain would have revealed nothing germane to the fair lead problem; the court's finding related rather to *positioning.* Additionally, the testimony of Thomas Bender was persuasive that his company did in fact exercise care in installation, despite the slightly improper location of the block and hanger frame.

Finally, Brasea postulates that CMC should be required to pay 90% of whatever damages are ultimately awarded. The theory is that but for the lack of a brake on the winch, Williams would have sustained relatively minor injury to his left hand, which was caught when he first yelled for the power to be cut. Medical testimony was introduced to the effect that had Williams only suffered this injury to his left hand he would still have been able to resume 90% of his normal daily activities after the accident. From this it is argued that CMC's failure to provide a brake produced 90% of Williams' full disability, and that it should therefore contribute a similar proportion to his monetary recovery. Authority for the argument advanced is asserted to be found in Horton & Horton, Inc. v. T/S J. E. Dyer, 5 Cir. 1970, 428 F.2d 1131. We acknowledge the novelty of the argument, but do not pass upon its merits or the possible application of *Horton.* Again, our resolution, infra Part V, of the negligence and products liability issues in CMC's favor moots the discussion and its decision.

IV. CROSS-APPEAL BY BENDER

At the outset we are met with Bender's claim that the trial court lacked jurisdiction over it. Jurisdiction over Bender, an Alabama corporation, was claimed under the Texas Long Arm Statute, Vernon's Tex.Rev.Civ.Stat.Ann., Art. 2031b (1959). The requisite activity within Texas for jurisdiction to attach is measured by the "minimum contacts" standard. We have earlier noted that "the Texas purpose [in enacting article 2031b] was to exploit to the maximum the fullest permissible reach under federal constitutional restraints." Atwood Hatcheries v. Heisdorf & Nelson Farms, 5 Cir. 1966, 357 F.2d 847, 852. Bender's motion to dismiss for lack of jurisdiction and to quash service addressed to the lower court, was denied by a well reasoned memorandum and order. Williams v. Brasea, Inc., S.D.Tex. 1970, 320 F.Supp. 658. For the reasons there well articulated we hold that the district court had personal jurisdiction over Bender, under the teachings of Hearne v. Dow-Badische Chemical Co., S.D.Tex.1963, 224 F.Supp. 90, applying International Shoe Co. v. State of Washington, 1945, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, to the Texas Statute, Article 2031b.

Before reaching the merits of the products liability issues in this case, we pause to comment upon the theoretical posture in which they arose. The incorporation of products liability law into general maritime law is of most recent vintage. District courts have divided on the propriety of such incorporation, and only one appellate court has passed judgment thus far on the issue (by approving the incorporation). Lindsay v. McDonnell Douglas Aircraft Corp., 8 Cir. 1972, 460 F.2d 631. We do not believe that a case such as this, which in our judgment fails to establish liability under the theory, presents the appropriate vehicle for consideration of whether that theory should be made part of the maritime law in this circuit. Thus we qualify our holding by saying that *even if* products liability law is to be incorporated into our general maritime law, there can be no liability under the facts of this case. The question of incorporation *vel non* is left open for decision at a later date when more guidelines may be available.

The district court relied upon the theory of strict liability set forth in the Restatement of Torts 2d, Sec. 402A, which provides, in pertinent part:

> "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, . . ."

As is evident from the language of the Restatement, three elements of proof must be present: (1) defective condition of the product; (2) unreasonable danger to the user; and (3) proximate cause of injury. Assuming *arguendo* that Bender's installation of the winch resulted in a lack of fair lead which may be termed a defective condition, our judgment is that it was neither unreasonably dangerous nor a proximate cause of Williams' injuries.

The defect alleged was dangerous in that it increased the likelihood of lines tangling on the cathead. It is significant to note that it merely increased the likelihood of an event not at all uncommon on shrimp trawlers, i.e. lines tangling on a cathead. The district court in its Final Order expressly acknowledged this pre-existing likelihood. App. at 1747.

Assuming then that the tangling of lines is dangerous, the question then is whether a defect increasing the likelihood of that event makes it *unreasonably* dangerous. We find the answer in Sec. 402A com. i: "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with ordinary knowledge common to the community as to its characteristics." We are unable to conclude that the tangling which led to Williams' injury was beyond the contemplation of seamen who had common knowledge that lines on shrimp boats frequently tangle. As a matter of elementary logic, such a conclusion would be a manifest *non sequitur*. We hold accordingly that the position of the snatch block frame was not unreasonably dangerous as a matter of law.

In the next place proximate cause is absent under the facts as given. To use common law terms for the moment, the requisite foreseeability was lacking; see Helene Curtis Industries, Inc. v. Pruitt, 5 Cir. 1967, 385 F.2d 841 (foreseeability as part of proximate cause considered in the field of products liability as to hair bleaching products). If Williams ordered the power on, Bender can hardly be charged with anticipating his doing so while his hands were in the line around the cathead. Alternatively, if Terry acted without authority, neither should Bender be charged with foreseeing that he would do so while Williams had his hands in the line.

The comments to Sec. 402A support this conclusion in even more precise terms. If Williams ordered the power turned on, comment n would be applicable: "voluntarily and unreasonably proceeding to encounter a known danger, (which) commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability." If Terry turned the power on without instruction from Williams, comment g would control: "The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful . . ." Lines tangle regardless of whether a fair lead problem may exist, but only Terry's mishandling of the product, assuming he acted without authority, produced the injury. Under either or any of the foregoing posited analyses, we hold that Bender could not be properly held liable in products liability.

V. CROSS-APPEAL BY CMC

The sole basis of liability arrived at by the trial court as to CMC was its failure to provide a braking mechanism on the winch it sold to Bender. All the crewmen knew it lacked a brake, and the evidence was clear that winches with brakes were almost non-existent on trawlers used by the shrimping industry.

Although the district court perceived this omission by CMC as an unreasonably dangerous defect, that characterization is not, strictly speaking, permissible under these facts. According to the commentary, a defective condition obtains only when "the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, ..." Sec. 402A com. g. The winch was not "defective" because all involved knew that it lacked a brake. This case falls into the category of defective design, situations in which the "defect" is said to inhere in the design of the product, i.e. lack of a safety device. The "defect" issue is thus subsumed into a determination of whether that design, though known full well to the user, rendered the product unreasonably dangerous to him. See, for example, Ross v. Up-Right, Inc., 5 Cir. 1968, 402 F.2d 943; Wade, Strict Tort Liability of Manufacturers, 18 S.W.L.J. 5 (1965).

The question then arises whether the lack of a brake made the winch "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, ..." Sec. 402A com. i. This proposition carries its own answer. The danger posed by the lack of a brake could scarcely be beyond the contemplation of crewmen who knew of its absence and worked with the winch in that condition on a daily basis.

Our conclusion is further supported by the theoretical approach advocated by Wade, supra, and others in defective design cases. Unreasonable danger is assessed under a cost-benefit analysis of the proposed safety device. Paraphrasing the variables suggested by Dean Wade, 19 S.W.L.J. at 17, we find the following in support of a "cost outweighs benefit" conclusion here: (1) catheads are practically indispensable to the shrimping business; (2) few, if any, are equipped with a braking device; (3)

the likelihood of injury is remote, limited to peculiar circumstances such as occurred in this unusual case; (4) the inherent danger is obvious to all; (5) injury could have been avoided but for the misuse of the product; and (6) installation of a brake would substantially increase the cost of the winch.

When we come to the element of proximate cause, CMC occupies a position nearly identical to that of Bender. Depending on whether an order to turn on the power was given by Williams or not, either assumption of risk or unanticipated product misuse, as described in comments n and g, Sec. 402A, may properly be inferred. We further think it manifest that such action is not the foreseeable type of conduct which should give rise to a holding of strict liability against a manufacturer.

VI. CONCLUSION

Our holdings are summarized as follows: (1) the case is remanded for a factual finding as to whether Williams ordered Terry to engage the power; (2) the district court is ordered to assess liability *in rem* as to the vessel CIAPESC I; (3) the district court's dismissal of the indemnity claims is affirmed; (4) the district court's finding that Bender and CMC were not negligent is affirmed; (5) the district court's finding of product liability is reversed; (6) Bender and CMC are due to be dismissed as parties defendant.

Affirmed in part, reversed in part and remanded with directions.

APPENDIX D

Roy C. WILLIAMS,
Plaintiff-Appellant Cross Appellee,

v.

BRASEA, INC., and VESSEL CIAPESCA I, her engines,
etc., Defendant-Appellee Cross Appellant,

Bender Welding & Machine Co., Inc.,
Defendant-Appellee Cross-Appellant,

Construction Machinery Company,
Defendant-Appellee Cross Appellant.

No. 72-3623.

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

May 23, 1975.

Appeals from the United States District Court
for the Southern District of Texas

ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC

(Opinion July 5, 1974, 5 Cir. 1974, 497 F.2d 67)

Before GEWIN, THORNBERRY and SIMPSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing filed on behalf of Roy C. Williams is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is denied.

The Petition for Rehearing filed on behalf of Brasea, Inc. is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is denied.

We have given thorough consideration to the petitions for rehearing and for rehearing en banc, as well as to the several briefs, including briefs by *amici curiae*, received in support of or in opposition thereto, before reaching our decision to deny the petitions.

We direct two slight changes in the panel opinion, Williams v. Brasea, Inc., 5 Cir. 1974, 497 F.2d 67.

Perceiving that our disposition of the cross-appeals (1) of Bender, Part IV of the panel opinion, 497 F.2d at 77-79, and (2) of CMC, Part V of the panel opinion, 497 F.2d at 79—holding that neither of said parties could be held liable under a theory of products liability—dissipated completely any basis for assessing damages *in rem* against the shrimp trawler CIAPESC I, we withdraw and recede from the following designated portions of the panel opinion:

(a) The statement appearing at page 75 of 497 F.2d:

> "Finally, Williams alleges that the district court erred by failing to enter judgment *in rem* against CIAPESC I despite the fact that the vessel was found to be unseaworthy. The point is well taken. The lower court specifically found the CIAPESC I

> unseaworthy, App. at 1754, and that finding is not challenged on appeal by Brasea either on brief or at oral argument. The district court on remand should make the appropriate modification on its final order."

(b) That portion of the "VI CONCLUSION" section of the opinion, appearing at page 80 of 497 F.2d:

> "(2) the district court is ordered to assess liability *in rem* as to the vessel CIAPESC I."

In lieu of (a) above the following language is substituted:

> "Finally, Williams alleges that the district court erred by failing to enter judgment *in rem* against CIAPESC I despite the fact that the vessel was found to be unseaworthy. The point would be well taken if the underpinning for the finding of unseaworthiness was sustained against the cross-appeals of Bender and CMC, either or both. The basis for the unseaworthiness finding by the district court was in fact its findings[1] that Bender and CMC provided

---

[1] "Therefore, the Court finds that the failure on the part of CMC to provide an adequate braking mechanism for the port cathead rendered the same defective and unreasonably dangerous to persons situated as was plaintiff, and, therefore, it was not reasonably suited for the purpose for which it was intended; and, further, that the absence of an adequate brake was a producing cause of injuries to plaintiff." (App. p. 1750)

"Therefore, the Court finds the placement of the snatch-block frame by Bender was such as to make the vessel, and particularly the area in front of and near the winch, unreasonably dangerous to users thereof, and thus it was not reasonably suited for the purpose for which it was intended; and such installation was a producing cause of the incident in which plaintiff was seriously injured." (App. p. 1751)

"Bender installed on the vessel, engine and power take off equipment which operated the winch, constructed a snatch-block frame the vessel CIAPESC I with equipment which was 'unreasonably dangerous', 'defective' and 'not reasonably suited for the purpose for which it was intended.' The district court's opinion further held 'The faults of Bender and CMC, as heretofore outlined, are the same faults which caused Defendant, Brasea, Inc., to afford to Plaintiff an unseaworthy vessel.' (App. p. 1760)

"Our disposition reversing the district court as to the cross-appeals of Bender and CMC, Parts IV and V of this opinion, *infra,* eliminates any basis for holding CIAPESC I liable *in rem.* The point is rendered moot."

With respect to (b) above the remaining numbered portions under "VI CONCLUSION" of the opinion, i. e. (3), (4), (5) and (6) are renumbered respectively (2), (3), (4) and (5).

The costs of this appeal are directed to be assessed one-half against the plaintiff-appellant-cross-appellee, Roy C. Williams, and one-half against the defendant-appellee-cross-appellant, Brasea, Inc.

---

which was above the winch and installed a rod with a handle on it which was part of the engine and power take off equipment." (App. p. 1744)

"No substantial change had occurred or modifications made in said winch, the port cathead, or the machinery related to the operation of the cathead, or in the snatch-block frame from the date of delivery of the vessel to Brasea until the time plaintiff suffered said injuries." (App. p. 1745).

APPENDIX E

Article III, Section 2, Clause 1 of the Constitution of the United States of America, provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Section 1333 of Title 28, United States Code, provides:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.
>
> (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize. June 25, 1948, c. 646, 62 Stat. 931; May 24, 1949, c. 139, § 79, 63 Stat. 101.

Section 688 of Title 46, United States Code, provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to

railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007.

APPENDIX F

Rule 9(h), Federal Rules of Civil Procedure provides:

> A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. The reference in Title 28, U.S.C. § 1292(a) (3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h).
>
> As amended Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; March 30, 1970, eff. July 1, 1970.

Rule 52(a), Federal Rules of Civil Procedure, provides:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that

the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

APPENDIX G

Section 402A of the RESTATEMENT (SECOND) OF TORTS provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Comment *b* provides:

> Since the early days of the common law those engaged in the business of selling food intended for human consumption have been held to a high degree of responsibility for their products. As long ago as 1266 there were enacted special criminal statutes imposing penalties upon victualers, vintners, brewers, butchers, cooks, and other persons who supplied "corrupt" food and drink. In the earlier part of this century this ancient attitude was reflected in a series of decisions in which the courts of a number of states sought to find some method of holding the seller of food liable to the ultimate consumer even

though there was no showing of negligence on the part of the seller. These decisions represented a departure from, and an exception to, the general rule that a supplier of chattels was not liable to third persons in the absence of negligence or privity of contract. In the beginning, these decisions displayed considerable ingenuity in evolving more or less fictitious theories of liability to fit the case. The various devices included an agency of the intermediate dealer or another to purchase for the consumer, or to sell for the seller; a theoretical assignment of the seller's warranty to the intermediate dealer; a third party beneficiary contract; and an implied representation that the food was fit for consumption because it was placed on the market, as well as numerous others. In later years the courts have become more or less agreed upon the theory of a "warranty" from the seller to the consumer, either "running with the goods" by analogy to a covenant running with the land, or made directly to the consumer. Other decisions have indicated that the basis is merely one of strict liability in tort, which is not dependent upon either contract or negligence.

Recent decisions, since 1950, have extended this special rule of strict liability beyond the seller of food for human consumption. The first extension was into the closely analogous cases of other products intended for intimate bodily use, where, for example, as in the case of cosmetics, the application to the body of the consumer is external rather than internal. Beginning in 1958 with a Michigan case involving cinder building blocks, a number of recent decisions have discarded any limitation to intimate association with the body, and have extended the rule of strict liability to cover the sale of any product which, if it should prove to be defective, may be expected to cause physical harm to the consumer or his property.

Comment *g* provides:

> The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him. The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.
>
> Safe condition at the time of delivery by the seller will, however, include proper packaging, necessary sterilization, and other precautions required to permit the product to remain safe for a normal length of time when handled in a normal manner.

Comment *i* provides:

> The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinarily sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by "unreasonably dangerous" in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey,

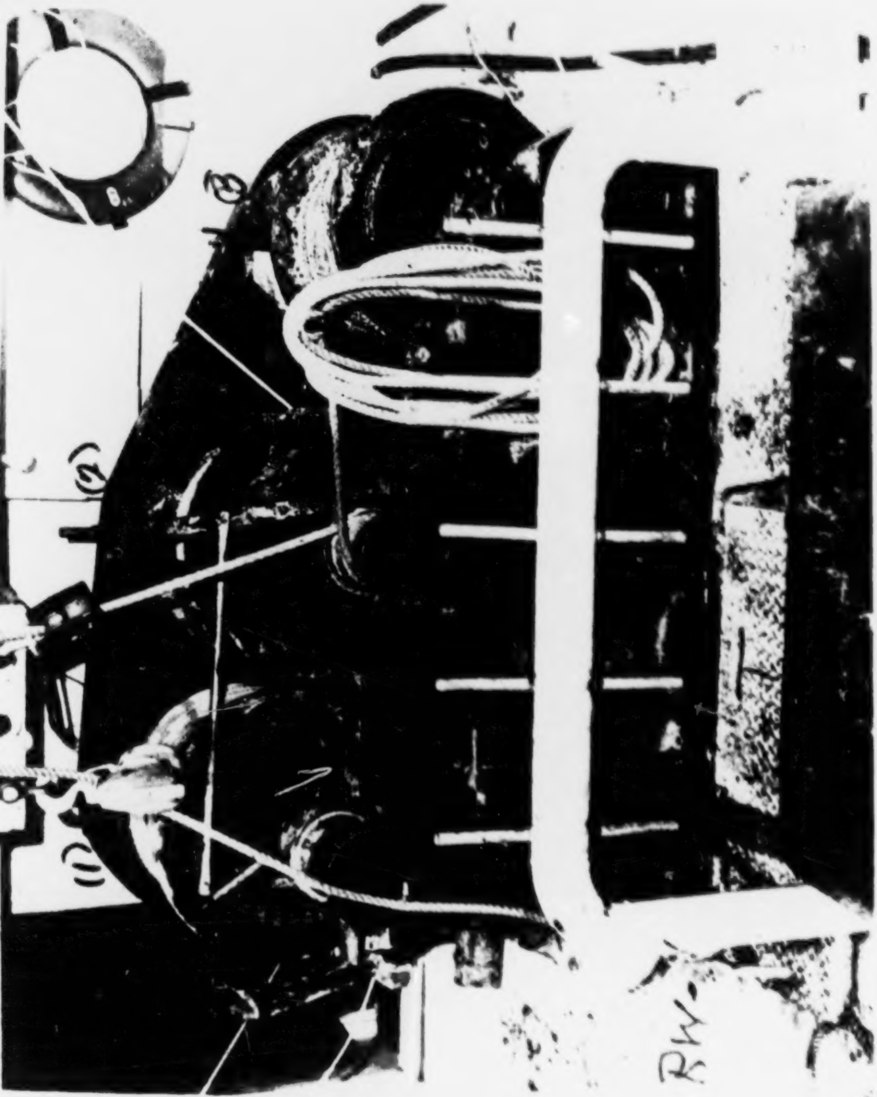
> containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.

Comment *n* provides:

> Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see §524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

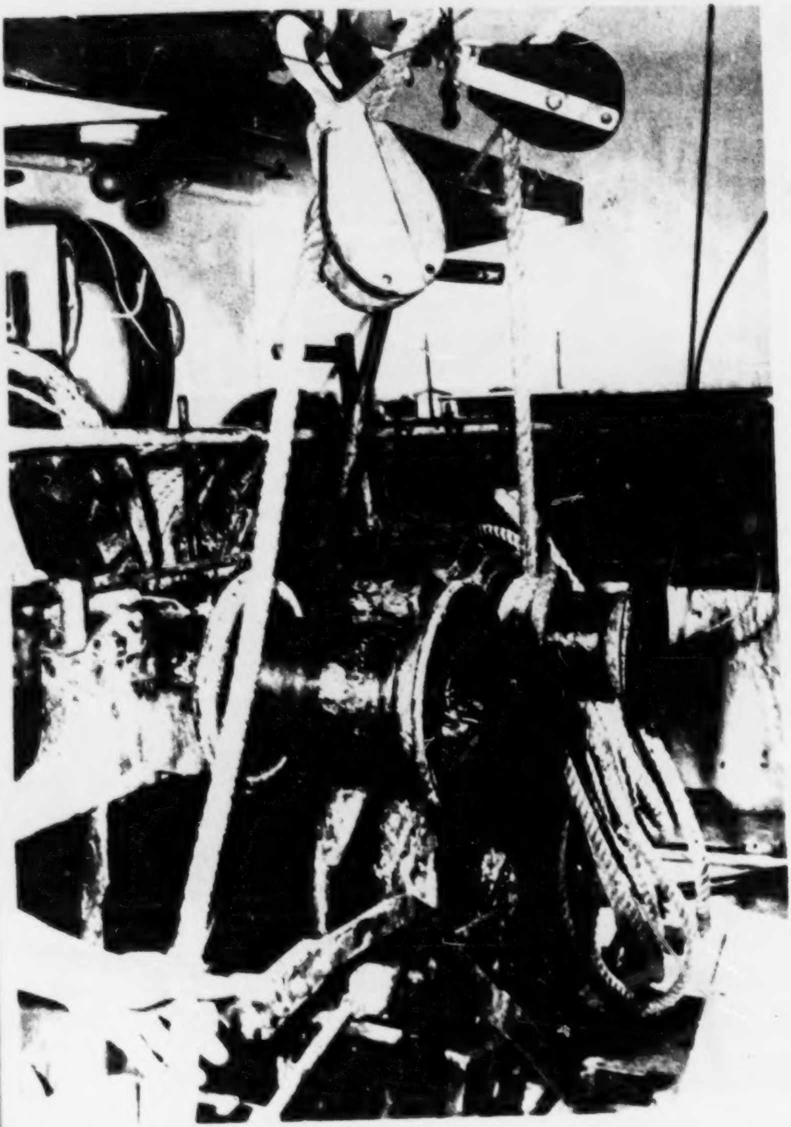
APPENDIX H

PLAINTIFF'S EXHIBIT 3



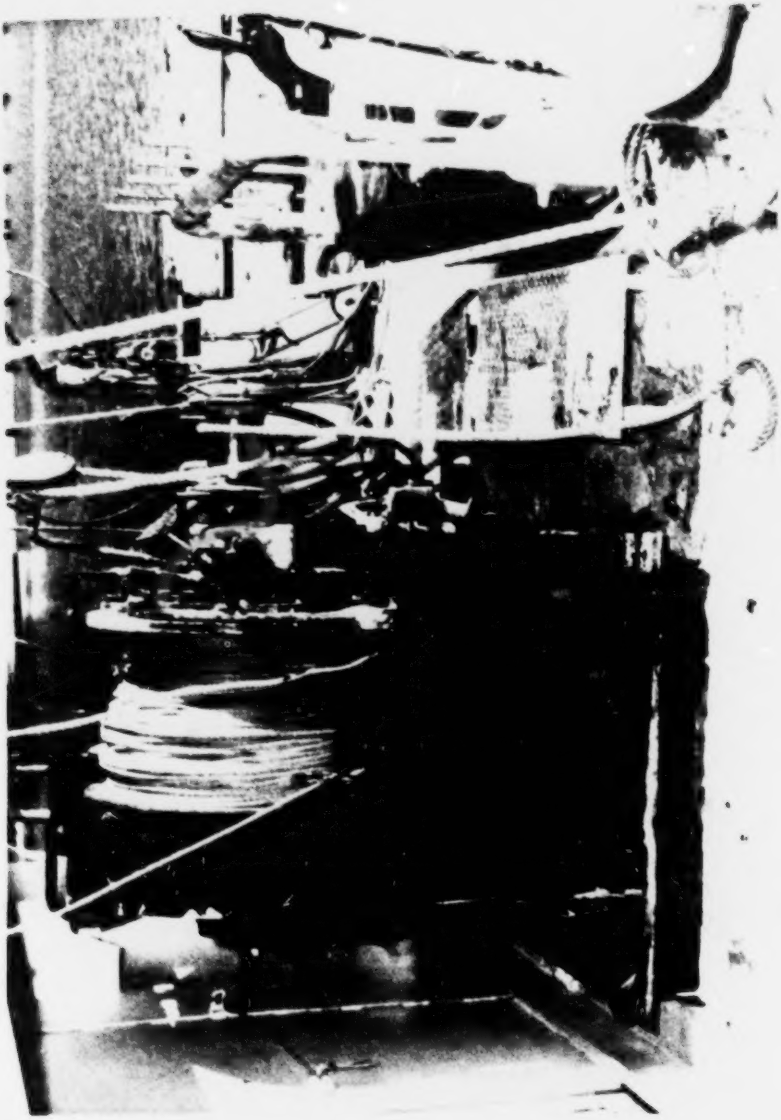
APPENDIX I

PLAINTIFF'S EXHIBIT 5



APPENDIX J

PLAINTIFF'S EXHIBIT 10



LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
SEP 8 1975
MICHAEL RODAK, JR., CLERK

NO. 75-209
NO. 75-225

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

ROY C. WILLIAMS, *Petitioner*

v.

BRASEA, INC., and VESSEL CIAPESC I, Her engines, etc., BENDER WELDING & MACHINE COMPANY, INC., and CONSTRUCTION MACHINERY COMPANY, *Respondents*

BRASEA, INC., *Petitioner*

v.

BENDER WELDING & MACHINE COMPANY, INC., ET AL., *Respondents*

REPLY OF RESPONDENT, BENDER WELDING & MACHINE COMPANY, INC., TO THE PETITIONS FOR WRIT OF CERTIORARI

Of Counsel:

WATKINS & MARSHALL
750 The Main Building
Houston, Texas 77002

A. J. WATKINS
JOHN C. MARSHALL
Attorneys for Respondent,
Bender Welding & Machine
Company, Inc.

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

SUBJECT INDEX

Page

Basis for Reply 2

Question Presented 2

Whether Petitioners Have Submitted "Special and Important Reasons" For This Court's Exercise of its Sound Judicial Discretion by Reviewing this Cause Upon Certiorari 2

Statement of the Case 2

Reasons for Refusing the Writ 2

I. The Court of Appeals Did Not Fail to Apply the General Maritime Law to Williams' Claims Against Bender; It Merely Held that it Need Not Decide Whether Section 402A of the RESTATEMENT (Second) OF TORTS is Incorporated Into the General Maritime Law Because the Requirements of Section 402A are not Satisfied in this Case (In Reply to Petitioner Williams' Point No. II). 2

II. Brasea is Not Entitled to Indemnity from Bender (In Reply to Petitioner Brasea's Point No. I). 10

III. The Court of Appeals Did Not Abrogate Any Appellate Responsibilities in Reversing the District Court's Findings on Liability and Causation as to Bender (In Reply to Petitioner Brasea's Point No. II(b)). 11

Conclusion 12

Certificate 15

TABLE OF AUTHORITIES

CASES

Page

Cronin v. J. B. E. Olson Corp., 501 P.2d 1153 (Calif. Sup. 1972) 5, 6

Delta Engineering Corp. v. Scott, 322 F.2d 11 (5th Cir. 1963) 11

Dippel v. Sciano, 37 Wisc. 2d 443, 155 N.W.2d 55 (1967) 5

Eshbach v. W. T. Grant's & Co., 481 F.2d 940 (3rd Cir. 1973) 7

Fay v. Noia, 372 U.S. 391 (1963) 12

Greene v. Clark Equipment Co., 237 F. Supp. 427, 429 (N.D. Ind. 1965) 9

CASES

Page

Helene Curtis Industries, Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967) 7, 10
Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315 (1964) 10, 11
Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631 (8th Cir. 1972) 4
Reyes v. Wyeth Laboratories, 498 F.2d 1264 (5th Cir. 1974) 7
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1965) 12, 13
Ross v. Up-Right, Inc., 402 F.2d 943 (5th Cir. 1968) 7
Ryan Stevedoring Co. v. Pan-Atlantic Steamship Co., 350 U.S. 124 (1956) 10, 11
United States v. U. S. Gypsum Co., 333 U.S. 364 (1948) 12

STATUTES

46 U.S.C. sec. 761 4

FEDERAL RULES OF CIVIL PROCEDURE

Rule 19, Fed. R. Civ. P. 12
Rule 24, Fed. R. Civ. P. 2

PERIODICALS

Dickerson, Products Liability: How Good Does a Product Have to Be? 41 IND. L. J. 301, 329 (1967) 7
Keeton, Products Liability & The Meaning of Defect, 5 ST. MARY'S L. J. 30, 32 (1972) 6
Levine, Buyers' Conduct As Affecting the Extent of Manufacturers' Liability In Warranty, 52 MINN. L. REV. 629, 635 (1968) 5
Noel, Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk, 25 VAND. L. REV. 93, 103 (1972) 9
Noel, Products Liability, Bystanders, Contributory Fault and Unusual Uses, 50 F. R. D. 321, 332, 333 (1970) 9
Noel, Products Defective Because of Inadequate Directions or Warnings, 23 Sw. L. J. 256, 267 (1969) 9
Wade, Strict Tort Liability for Manufacturers, 19 Sw. L. J. 5, 22, 23 (1965) 7

RESTATEMENTS

RESTATEMENT (SECOND) OF TORTS, sec. 402A (1965) 2, 3, 4, 5, 6, 7, 8, 10, 13

NO. 75-209
NO. 75-225

IN THE
Supreme Court of the United States
OCTOBER TERM 1975

ROY C. WILLIAMS, *Petitioner*

v.

BRASEA, INC., and VESSEL CIAPESC I, Her engines, etc., BENDER WELDING & MACHINE COMPANY, INC., and CONSTRUCTION MACHINERY COMPANY, *Respondents*

BRASEA, INC., *Petitioner*

v.

BENDER WELDING & MACHINE COMPANY, INC., ET AL., *Respondents*

REPLY OF RESPONDENT, BENDER WELDING & MACHINE COMPANY, INC., TO THE PETITIONS FOR WRIT OF CERTIORARI

Respondent, Bender Welding & Machine Company, Inc., prays that the Petitions of Roy C. Williams and Brasea, Inc., be refused, and in support of that prayer would respectfully show as follows:

BASIS FOR REPLY

This brief on behalf of Respondent, Bender Welding & Machine Company, Inc., is submitted pursuant to U. S. Supreme Court Rule 24, 28 U.S.C.

QUESTION PRESENTED

> Whether Petitioners Have Submitted "Special and Important Reasons" for This Court's Exercise of its Sound Judicial Discretion by Reviewing this Cause Upon Certiorari.

STATEMENT OF THE CASE

Respondent adopts the Statement of the Case, under the subheading "Facts", found in the opinion of the United States Court of Appeals for the Fifth Circuit reported at 497 F.2d 67.

REASONS FOR REFUSING THE WRIT

I.

THE COURT OF APPEALS DID NOT FAIL TO APPLY THE GENERAL MARITIME LAW TO WILLIAMS' CLAIMS AGAINST BENDER; IT MERELY HELD THAT IT NEED NOT DECIDE WHETHER SECTION 402A OF THE RESTATEMENT (SECOND) OF TORTS IS INCORPORATED INTO THE GENERAL MARITIME LAW BECAUSE THE REQUIREMENTS OF SECTION 402A ARE NOT SATISFIED IN THIS CASE.

Both Petitioners have complained of the Court of Appeals' failure to hold that the doctrine of strict tort liability found in Section 402A of the RESTATEMENT (SECOND) OF TORTS is incorporated into the general maritime law. Petitioner Williams has charged that the reviewing court thus failed to apply general maritime law and fell into conflict with other opinions of this Court or the Circuit Courts. In point of fact the Court of Appeals' holding was that, because liability under the strict tort theory of Section 402A had not been demonstrated in this case, there was no need to decide the bolder and far-reaching question of incorporation of the entire strict tort doctrine announced there into the general maritime law. This was an admirable exercise of judicial restraint and merits applause, not criticism.

It is a puzzling inconsistency for Petitioner to have contended previously that the doctrine of Section 402A is embraced by the general maritime law and controls the question of Bender's liability, to have secured a favorable judgment from the Trial Court based upon that doctrine, and then, when the Appellate Court finds no liability under that doctrine, to maintain that the reviewing court erred in assessing liability under it. It is even more puzzling that Williams should charge the Court of Appeals with applying state or common law to this case. It was Williams who first pleaded Section 402A and secured a judgment on the basis of it. And, it is Williams who even now maintains that strict liability is part of admiralty law. The Fifth Circuit did not hold that it is not. Rather, that Court took the 402A formula urged upon it by Williams and found liability lacking under the formula. Petitioner is simply fashioning false arguments.

As Respondent Bender previously pointed out to the Fifth Circuit, the question of incorporation of Section

402A of the RESTATEMENT (SECOND) OF TORTS into the general maritime law is still very much an open and unresolved question. The only federal appellate court which has addressed itself to Section 402A in maritime matters is the Eighth Circuit in *Lindsay v. McDonnell Douglas Aircraft Corporation,* 460 F.2d 631 (8th Cir. 1972). That case involved the death of a test pilot flying over navigable waters and was brought under the Death on the High Seas Act, 46 U.S.C. sec. 761. The Court of Appeals thus was quite prudent in declining to hold directly that the general maritime law unquestionably includes the Section 402A embodiment of strict liability. Such a holding, even were it not lacking in authoritative support, should be reserved for a case in which a clear case of liability is presented by the Appellate record. As is amply demonstrated in the Fifth Circuit's opinion, this is not such a case.

Williams' prime concerns regarding application of Section 402A, none of which he entertained at the Trial Court level when he enjoyed a judgment based upon that doctrine, seem to focus upon supposed inconsistencies with past maritime concepts. These illusions, however, are quickly dispelled by the light of examination. For example, the complaint that Williams' recovery should not have been reduced by forty percent because Section 402A disallows contributory negligence as a bar to recovery falls for at least two reasons. First, as is suggested in *Lindsay v. McDonnell Douglas Aircraft Corporation,* supra, a case advanced by Petitioner, comparative negligence and Section 402A may be harmonized. This is so when it is recalled that comparative negligence does not bear on the question of liability as would a defensive issue such as contributory negligence; it speaks only to the issue of damages. Levine, Buyers' Conduct as Affecting the Extent of Manufacturers' Liability in Warranty, 52 MINN. L. REV. 629 at 635 (1968); see *Dippel v. Sciano,* 37 Wis. 2d 443, 155 N.W.2d 55 (1967). As Petitioner himself points out, contributory negligence has been dropped in favor of comparative negligence in other areas of maritime law, so why not again? Second, of course, as the Fifth Circuit carefully explained, this question was simply not even reached in the instant case because no liability against Bender under Section 402A was established.

Petitioner Williams also expressed concern that the Fifth Circuit cited only two non-maritime diversity cases based upon Texas products law and its treatment of Section 402A. This complaint overlooks the documented paucity of maritime strict liability cases. The cases cited were recent ones decided by the Fifth Circuit, the same Appellate Court as here, and involving the same new and just-developing legal doctrine, Section 402A. In the absence of a body of Federal maritime decisions applying that doctrine, these cases are persuasive. It must be noted at this point that Petitioner has himself cited in his brief numerous opinions from different jurisdictions about the country in his discussion of Section 402A.

Petitioner's other fears of conflict between Section 402A and past maritime principles or inconsistency in interpretation center upon the "unreasonably dangerous" concept, use of "proximate cause" language, the effect of product users' knowledge in determining liability, the role of assumption of risk and the legal significance of product misuse. Regarding the "unreasonably dangerous" element, Petitioner relies upon the well-discredited opinion in *Cronin v. J. B. E. Olson Corporation,* 501 P.2d 1153

(Calif. Sup. 1972). While it has been said that the terms "defective" and "unreasonably dangerous" are not separate requirements under Section 402A, it hardly follows that the notion of "unreasonable danger" may safely be jettisoned from the strict liability doctrine altogether. Rather, as Dean Page Keeton, perhaps the foremost authority on products liability and a member of the advisers who penned Section 402A, has recently observed, the term "unreasonably dangerous was meant . . . as a definition of defect." Keeton, Products Liability and the Meaning of Defect, 5 ST. MARY'S L. J. 30, 32 (1972). Thus, says Dean Keeton in criticism of *Cronin,*

> "The difficulty is that no context was given to the concept of defect and this is vitally important when a plaintiff's theory is that a product, although fabricated and constructed as it was intended to be, subjected users or others to an inherent risk of harm that made the product defective." 5 ST. MARY'S L. J., supra, at 31.

Comment i under Section 402A of the RESTATEMENT is the original and by far the most widely accepted test of unreasonable danger. The rationale behind the test there stated is well-explained in the comment.

Regarding proximate cause, the Fifth Circuit concluded that Bender's alleged mispositioning of the snatch block frame was not a proximate cause of injury. The Court held that Bender was not required to foresee the type of risks which manifested themselves in this case. While a manufacturer could foresee snarls in the line and attempts to correct them, no reasonble court could require it to anticipate that an individual would order the power to a winch turned on when his hands were in the line, or that another would turn the power on while his Captain's hands were so situated. This position does no violence to *Eshbach v. W. T. Grant's & Co.,* 481 F.2d 940 (3d Cir. 1973), cited by Williams. In the words of *Eshbach,* such use was neither intended nor foreseeable and the injury was not "the probable result of the normal use of the product or a use which can be reasonably anticipated." The only authorities cited by Petitioner which even hint that proximate causation is not the proper causation inquiry are, ironically enough, Texas cases, use of which was previously criticized by Petitioner. On the other hand, the Fifth Circuit has consistently sanctioned use of a proximate cause formula in Section 402A cases. E.g., *Helene Curtis Industries, Inc. v. Pruitt,* 385 F.2d 841 (5th Cir. 1967); *Ross v. Up-Right, Inc.,* 402 F.2d 943 (5th Cir. 1968); cf. *Reyes v. Wyeth Laboratories,* 498 F.2d 1264 (5th Cir. 1974). This practice has broad support among the commentators. Dickerson, Products Liability: How Good Does a Product Have to Be? 41 IND. L. J. 301 at 329 (1967); Wade, Strict Tort Liability for Manufacturers, 19 Sw. L. J. 5 at 22, 23 (1965).

As for the effect of a product user's awareness of product danger on liability, two things should be stressed. First, Respondent agrees that other factors can be relevant when assessing the reasonableness vel non of the level of product danger. In fact, the Fifth Circuit expressly applied a "cost-benefit" analysis and weighed a number of factors pertinent to the question of reasonableness of danger posed. But, under Section 402A and comments g and i, both defect and reasonable danger are defined in terms of consumer expectations, an objective test, and this type of case reveals unusually complete user knowledge regarding potential product danger. The only "absurd result" possible here, to use Petitioner's vernacular, would

BLURRED COPY

be a finding that the equipment onboard the boats of veteran shrimper captains is more dangerous than they ever contemplate. Such a conclusion would literally fly in the face of the entire record regarding shrimpboats and their captains. Second, user knowledge as a defensive matter presents a subjective test and inquires into a particular user's actual knowledge and appreciation of a specific product danger. Petitioner's authorities on this question do not hold that user knowledge is relevant *only* as a defensive issue; they all are cases where only the defensive matter of assumption of the known risk was an issue. Petitioner has confused what are two separate and distinct elements of the case, i.e., (a) liability, a part of plaintiff's case, and (b) defensive issues, part of the defendant's case and relevant only if liability is already established.

The defense of assumption of risk is clearly provided in Comment n under Section 402A. Williams has complained that such a defense is not recognized under other established maritime principles such as seaworthiness. However, as Petitioner himself carefully points out, strict tort and unseaworthiness are two separate doctrines and these two separate doctrines provide theories of recovery against different potential defendants. The seaworthiness doctrine is restricted to ships and their owners, whereas strict liability opens avenues of recovery from, e.g., those who build the ship or its component parts and equipment, as here. More significantly, as Petitioner observes in his petition to this Court, the seaworthiness doctrine was developed out of an abundance of concern for the seaman who is at the mercy of the ship, upon which he must live for months at a time, and its owner. Where the entire rationale behind, and the purposes of, the two doctrines are different, differences in the doctrines themselves are understandable and not without justification. Even so, assumption of risk is not essential to the Fifth Circuit's exoneration of Bender from liability in this case. Bender was exonerated because its product was not defective and unreasonably dangerous and did not cause Petitioner's injuries. Thus, any treatment of assumption of risk in the Appellate Court's opinion is not critical to this appeal and the proper role of assumption of risk in maritime strict tort liability cases must properly be left for another day.

As for product misuse, proof of misuse in a products liability case is a means of establishing that the product is not characterized by a defect which caused the accident. Noel, Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk, 25 VAND. L. REV. 93, 103 (1972); Noel, Products Liability, Bystanders, Contributory Fault and Unusual Uses, 50 F.R.D. 321, 332, 333 (1970); Noel, Products Defective Because of Inadequate Directions or Warnings, 23 SW. L. J. 256, 267 (1969). Or, otherwise stated,

> "Use different from or more strenuous than that contemplated to be safe by ordinary users/consumers, that is, 'misuse', would either refute a defective condition or causation." *Greeno v. Clark Equipment Co.*, 237 F. Supp. 427, 429 (N.D. Ind. 1965)

In the instant case the winch on the CIAPESC I, as rigged, imposed no undue threat to those on board and would never have been a source of injury to Williams without Seaman Terry's having turned on the power. Snarling of lines on winches sans brakes was a very common annoyance on shrimpers and a fact of life well-understood by Petitioner Williams. The evidence disclosed

BLURRED COPY

that lines will tangle regardless of whether a fair lead problem might exist. Williams' and Terry's acts are what produced the injury. *Watz v. Zapata Off-Shore Company,* 431 F.2d 100-116 (5th Cir. 1970), cited by Petitioner, held that only *foreseeable* third party abuse attaches liability to the defendant, just as only foreseeable misuse will fail to be of aid to a defendant in a products case. E.g., *Helene Curtis,* supra. The sine qua non to injury and the element for which Bender is in no way responsible was the re-activation of the winch while Williams' hands were enmeshed in the line.

The Fifth Circuit, of course, made no unqualified holding of misuse in its opinion. It chose instead to hinge misuse upon a finding, upon remand, that Terry negligently turned the power back on, saying that the misuse comment to Section 402A, comment g, buttresses the conclusion that the product here in question was not defective and unreasonably dangerous and was a cause of Williams' injuries. This is entirely consistent with the misuse authorities cited above. Petitioner's complaints regarding misuse, then, are academic exercises and will avail him nothing on appeal.

II.

BRASEA IS NOT ENTITLED TO INDEMNITY FROM BENDER.

Petitioner Brasea has maintained that, should the liability of Respondents CMC and Bender Welding & Machine Company, Inc., be restored by this Court, then it is entitled to indemnity from Respondents upon the basis of *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Co.,* 350 U.S. 124 (1956) and *Italia Societa v. Oregon*

Stevedoring Co., 376 U.S. 315 (1964). Both of those cases, however, involve suit by a shipowner against a stevedore to reclaim damages to an injured employee of the stevedoring company, not suit against a product manufacturer or assembler. And in those cases the injured party was a longshoreman, not a ship's master. The *Ryan* doctrine has long been recognized as one devoted to the traditional relation of stevedore-shipowner and repairman-shipowner. E.g., *Delta Engineering Corp. v. Scott,* 322 F.2d 11 (5th Cir. 1963).

Moreover, as the Fifth Circuit appropriately pointed out in its opinion in this case, *Ryan* was limited to a situation of contract breach, but there is none here and the District Court did not make a finding of any in its Memorandum and Order. Further still, if on remand Seaman Terry, and thus Brasea, is found to have been negligent, then the sole source of Brasea's liability will not be anything attributable to Bender or CMC and indemnity from them will not be appropriate.

Petitioner Brasea has thus failed to demonstrate any genuine and material conflict between the Fifth Circuit's opinion in this cause and past opinions of Federal Appellate Courts. Accordingly, review on certiorari is not mandated.

III.

THE COURT OF APPEALS DID NOT ABROGATE ANY APPELLATE RESPONSIBILITIES IN REVERSING THE DISTRICT COURT'S FINDINGS ON LIABILITY AND CAUSATION AS TO BENDER.

The Court of Appeals' holdings exonerating Bender were holdings as a matter of law. They do not represent

BLURRED COPY

instances of an Appellate Court substituting its assessment of the proper weight and quantum of conflicting facts for the determination made by the trial court. A reversal of a trial court's conclusions regarding liability and causation issues as a matter of law is necessarily a decision by the reviewing court that the trial court's conclusions were "clearly erroneous". The Fifth Circuit was obviously well aware of the standard "clearly erroneous" rule in rendering its opinion. Indeed, it noted earlier in its initial opinion that,

> "(We) review the record mindful that factual determinations are to be overturned only if clearly erroneous. F.R.Civ. P. 52(a)." McAllister v. United States, 1954, 348 U.S. 19, 75 S.Ct. 6th, 99 L.Ed. 20.

A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court is convinced on the whole record that a mistake has been committed. *United States v. United States Gypsum Company,* 333 U.S. 364 (1948). An appellate court is never paralyzed by the "clearly erroneous" test from reversing a trial court's finding which defies logic or flies in the face of established law.

CONCLUSION

Petitioners may obtain the ear of this Court only by presenting "special and important reasons" for review on writ of certiorari, review turning completely upon the Court's exercise of discretion. U. S. Supreme Court Rule 19, 28 U.S.C.; *Fay v. Noia,* 372 U.S. 391 (1963). The language "special and important reasons" within this rule relating to granting of certiorari has been said to relate to problems beyond the academic. *Rice v. Sioux City*

Memorial Park Cemetery, 349 U.S. 70 (1955). No such reasons have been advanced in the petitions now before this Court. No compelling inconsistency has been demonstrated between the Fifth Circuit's opinion in this cause and other past opinions of its fellow Courts of Appeal or this Court. To the contrary, the Court of Appeals assessed Bender Welding & Machine Company's potential liability under the Section 402A doctrine urged by Petitioner Williams and employed by the Trial Court and held that the shrimper constructed by Bender was not defective and unreasonably dangerous and was not the legal cause of Petitioner Williams' injuries. That holding quite simply foreclosed the entire range of academic concerns voiced by Petitioner Williams in his petition. The Fifth Circuit did not decline to apply maritime law and did not apply state law instead. It merely took the legal theory of liability employed by the lower court and held that it need not face the greater question of incorporation of that theory into the general maritime law inasmuch as no liability was established beneath the doctrine in the first place. Thus this Court is not required to pass upon supposed conflicts between Section 402A and established maritime principles or the form in which Section 402A will proceed as an available basis for action under the aegis of admiralty law. And, because Petitioner Williams has not attacked the accuracy of the Fifth Circuit's holdings of no liability, attacking instead only the propriety of using Section 402A to determine the question of liability, there is no ground for entertaining this petition for writ of certiorari.

Brasea's petition is without basis as well. Brasea has expressly conditioned its petition as to Bender upon a conclusion that Bender's product was indeed defective and unreasonably dangerous and was a proximate cause

BLURRED COPY

of Williams' injuries. Respondent Bender has demonstrated both that there is no basis for such a reversal and that, regardless of the matter of Bender's exoneration, Brasea is not entitled to indemnity from Bender anyway, as the Court of Appeals correctly observed.

Accordingly, Respondent Bender Welding & Machine Company, Inc. prays that this Court refuse the petitions for certiorari of Roy C. Williams and Brasea, Inc., leaving the opinion(s) of the United States Court of Appeals for the Fifth Circuit intact, including dismissal of this Respondent as a party defendant.

Respectfully submitted,

A. J. WATKINS
JOHN C. MARSHALL
Attorneys for Respondent,
Bender Welding & Machine
Company, Inc.

Of Counsel:

WATKINS & MARSHALL
750 The Main Building
Houston, Texas 77002

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing petition for writ of certiorari have been deposited with the United States Postal Service, with proper first-class postage affixed thereto, certified mail, return receipt requested, addressed to each of the following counsel: J. Robert McKissick, Law Offices of William R. Edwards, 400 Wilson Tower, Corpus Christi, Texas 78403, attorneys for Petitioner Roy C. Williams; M. W. Meredith, P.O. Box 2768, Corpus Christi, Texas 78403, attorney for Construction Machinery Company; and Mr. Charles D. Kennedy, Suite 3710, One Shell Plaza, Houston, Texas 77002 and Mr. Jack G. Carinhas, Jr., 910 East Levee Street, Brownsville, Texas, attorneys for Petitioner Brasea, Inc., on this the ______ day of September, 1975.

WATKINS & MARSHALL

By______________________

Attorneys for Respondent,
Bender Welding & Machine
Company, Inc.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
SEP 13 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

NO. 75-209

ROY C. WILLIAMS,
Petitioner

v.

BRASEA, INC., VESSEL CIAPESC I, her engines, etc.,
BENDER WELDING & MACHINE COMPANY, INC.,
and CONSTRUCTION MACHINERY COMPANY,
Respondents

BRIEF OF RESPONDENT, CONSTRUCTION MACHINERY COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

M. W. MEREDITH, JR.
FINLEY L. EDMONDS
P. O. Drawer 2624
Corpus Christi, Texas 78403
Attorneys for Respondent,
Construction Machinery Company

Of Counsel:
MEREDITH & DONNELL
P. O. Drawer 2624
Corpus Christi, Texas 78403

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

SUBJECT INDEX

Page

Table of Authorities iii

Questions Presented for Review:

I. WHETHER THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE WINCH OF CONSTRUCTION MACHINERY COMPANY, AS DESIGNED, WAS NEITHER DEFECTIVE NOR UNREASONABLY DANGEROUS 2

II. WHETHER THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE WINCH OF CONSTRUCTION MACHINERY COMPANY, AS DESIGNED, WAS NOT THE PROXIMATE CAUSE OF PETITIONER'S INJURIES 2

III. WHETHER THE COURT OF APPEALS WAS CORRECT IN STATING THAT PETITIONER'S INJURIES WERE CAUSED BY IMPROPER USE OF THE WINCH PORT CATHEAD BY PETITIONER AND/OR SEAMAN EDWARD TERRY 2

Statement of the Case 3

Summary of the Argument 5

Reasons for Refusing to Grant the Writ 7

I. DETERMINATION OF THE QUESTION OF INCORPORATION OF STRICT PRODUCT LIABILITY INTO FEDERAL MARITIME LAW WAS UNNECESSARY, AND THE COURT OF APPEALS' DEFERRAL OF DETERMINATION OF THE QUESTION PRESENTS NO CONFLICT WITH ANY OTHER COURT OF APPEALS ... 8

II. IN RESORTING TO THE THEORY OF STRICT PRODUCT LIABILITY SET OUT IN THE *RESTATEMENT (SECOND) OF TORTS*, SEC. 402A, THE COURT OF APPEALS DID NOT FAIL OR REFUSE TO APPLY FEDERAL MARITIME LAW TO PETITIONER'S CLAIM AGAINST CONSTRUCTION MACHINERY COMPANY .. 10

Page

III. THE COURT OF APPEALS CORRECTLY HELD THAT THE WINCH OF CONSTRUCTION MACHINERY COMPANY, AS DESIGNED, WAS NEITHER DEFECTIVE NOR UNREASONABLY DANGEROUS 12
- A. The Theory of Strict Product Liability 12
- B. Enhancement of Injuries 17
- C. Evidence of Available Safety Design 21
- D. Strict Liability in Terms of Conduct 22
- E. Critique of Petitioner's Arguments on CMC's Duty 23

IV. THE COURT OF APPEALS CORRECTLY HELD THAT THE WINCH OF CONSTRUCTION MACHINERY COMPANY, AS DESIGNED, WAS NOT THE PROXIMATE CAUSE OF PETITIONER'S INJURIES 29
- A. Foreseeability of the Risk 29
- B. Cause-in-Fact 31

V. EITHER PETITIONER'S CONDUCT CONSTITUTES ASSUMPTION OF THE RISK, OR SEAMAN TERRY'S CONDUCT CONSTITUTES MISUSE OF THE WINCH WHICH WAS THE INTERVENING CAUSE OF PETITIONER'S INJURIES 32
- A. Petitioner's Assumption of the Risk 33
- B. Terry's Unintended Misuse 36

VI. THE DECISION OF THE COURT OF APPEALS WITH RESPECT TO BENDER AND BRASEA IS CORRECT 38
- A. Bender 38
- B. Unseaworthy Condition 38
- C. Terry's Conduct 40

Conclusion 40

Certificate of Service 42

TABLE OF AUTHORITIES

CASES

Page

Brody v. Overlook Hospital, 66 N.J. 448, 332 A.2d 596 (1975) 24
Brown v. General Motors Corp., 355 F.2d 814 (4th Cir. 1966) cert. den. 386 U.S. 1036 .... 36, 37
Brown v. Quick Mix Co., 454 P.2d 205 (Wash. Sup. 1969) 26
Cronin v. J.B.E. Olson Corp., 501 P.2d 1153 (Cal. Sup. 1972) 23, 24, 26
Downey v. Moore's Time-Saving Equipment, Inc., 432 F.2d 1088 (7th Cir. 1970) 36, 37
Elder v. Crawley Book Machinery Co., 441 F.2d 771 (3d Cir. 1971) 27, 34
Eshbach v. W. T. Grant's & Co., 481 F.2d 940 (3d Cir. 1973) 29, 30, 31
Ethicon, Inc. v. Parten, 520 S.W.2d 527 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ hist.) 31
Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966) 19, 20
Glass v. Ford Motor Co., 304 A.2d 562 (N.J. Sup., Law Div. 1973) 24
Hartman v. Miller Hydro Company, 499 F.2d 191 (10th Cir. 1974) 18
Hartzell Propeller Co., Inc. v. Alexander, 485 S.W.2d 943 (Tex. Civ. App.—Waco 1972, writ ref. n.r.e.) 31
Helene Curtis Industries, Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967) 14, 22, 29, 31, 36
Henrich v. Cutler Hammer Co., 460 F.2d 1325 (3rd Cir. 1972) 34
Hoover v. O. M. Franklin Serum Co., 444 S.W.2d 596 (Tex. Sup. 1969) 31
Johnson v. United States, 74 F.2d 703, 704 (2d Cir. 1935) 35
Kaczmarek v. Mesta Machine Company, 463 F.2d 675 (3d Cir. 1972); 481 F.2d at 943 30
Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968) 18, 19, 20, 22
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923) 41
Leistra v. Bucyrus Erie Company, 443 F.2d 157 (8th Cir. 1971) 36
Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631 (8th Cir. 1972) 9, 10, 11, 23
Luque v. McLeon, 501 P.2d 1163 (Cal. Sup. 1972) 26

CASES Page

McDevitt v. Standard Oil Company of Texas, 391 F.2d 364 (5th Cir. 1968) 36
McKee v. Brunswick Corp., 354 F.2d 577 (7th Cir. 1965) 11, 23
Messick v. General Motors Corp., 460 F.2d 485 (5th Cir. 1972) 27, 36
Nanda v. Ford Motor Co., 509 F.2d 213 (7th Cir. 1974) .. 19, 21, 22
Powell v. E. W. Bliss Co., 346 F. Supp. 819 (W.D. Mich. 1972) 27
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 41
Ross v. Up-Right, Inc., 402 F.2d 943 (5th Cir. 1968) 14, 36
Rourke v. Garza, 511 S.W.2d 331 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ granted, 18 Tex. Sup. Ct. Jr. 169 (Jan. 18, 1975) 28
Schneider v. Chrysler Motors Corp., 401 F.2d 549 (8th Cir. 1968) 36, 37
Suvada v. White Motor Company, 32 Ill. 2d 612, 210 N.E. 2d 182 (1965) 11
Texsun Feed Yards, Inc. v. Ralston Purina Company, 447 F.2d 660 (5th Cir. 1971) 34
Tomicich v. Western-Knapp Engineering Company, 423 F. 2d 410 (9th Cir. 1970) 36, 37
Turner v. Big Four Automotive Equipment Corp., 511 F.2d 133 (5th Cir. 1975) 20
Walsh v. Miehle-Goss-Dexter, Inc., 378 F.2d 409 (3d Cir. 1967) 27
Weakley v. Fischbach & Moore, Inc., 515 F.2d 1260 (5th Cir. 1975) 25

FEDERAL RULES OF CIVIL PROCEDURE

Rule 52(a), Fed. R. Civ. P. 38

RESTATEMENTS

RESTATEMENT (SECOND) OF TORTS, Sec. 402A (1965) 5, 10, 11, 12, 13, 17, 18, 23, 30, 34, 35, 36

LAW REVIEWS

Keeton, Products Liability—Inadequacy of Information, 48 T.L.R. 398 (1970) 22
Keeton, Products Liability & The Meaning of Defect, 5 St. Mary's L.J. 30, 32 (1972) 24
Wade, Strict Tort Liability of Manufacturers, 19 Sw. L.J. 5 (1965) 14, 16, 22, 31

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

NO. 75-209

ROY C. WILLIAMS,
Petitioner

v.

BRASEA, INC., VESSEL CIAPESC I, her engines, etc.,
BENDER WELDING & MACHINE COMPANY, INC.,
and CONSTRUCTION MACHINERY COMPANY,
Respondents

BRIEF OF RESPONDENT, CONSTRUCTION MACHINERY COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Construction Machinery Company, prays that the Petition of Roy C. Williams for Writ of Certiorari be refused. In support of that prayer, Respondent would respectfully show the following:

QUESTION PRESENTED FOR REVIEW

In response to Petitioner's statement of Question II of his "Questions Presented for Review" (Pet. for Writ, p.

2), Respondent submits that in the said Question II Petitioner commits two errors. First, he erroneously assumes the defective condition of the ship's equipment which is contrary to the holdings of the Court of Appeals below. Second, he raises a policy question about the applicability of general maritime law, which question is not even presented by the opinion of the Court of Appeals below. Instead, Respondent submits, the issues of law actually presented relevant to the claim of Petitioner against this Respondent can be stated as follows:

I

WHETHER THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE WINCH OF CONSTRUCTION MACHINERY COMPANY, AS DESIGNED, WAS NEITHER DEFECTIVE NOR UNREASONABLY DANGEROUS.

II

WHETHER THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE WINCH OF CONSTRUCTION MACHINERY COMPANY, AS DESIGNED, WAS NOT THE PROXIMATE CAUSE OF PETITIONER'S INJURIES.

III

WHETHER THE COURT OF APPEALS WAS CORRECT IN STATING THAT PETITIONER'S INJURIES WERE CAUSED BY IMPROPER USE OF THE WINCH PORT CATHEAD BY PETITIONER AND/OR SEAMAN EDWARD TERRY.

STATEMENT OF THE CASE

With respect to Petitioner's strict product liability claim against this Respondent, most of the relevant facts are discussed by the Court of Appeals in its opinion which is reported at 497 F.2d 67 (See Appendix, Petition for Writ, p. 56 et seq.). For the purposes of the argument below, Respondent would state the following facts, especially those relating to the issue of the design of Respondent's winch.

Essentially, Petitioner's claim against this Respondent is that the failure of Respondent to design into its winch some sort of brake for the port cathead enhanced his injuries. The accident itself—Petitioner's hands becoming entangled with the taught line on the suddenly turning cathead—was caused by a combination of his carelessness and the intentional re-engaging of power to the winch by his co-worker, Edward Terry.

For the "failure" to design and manufacture such a brake, the District Court held Respondent liable on its interpretation of the theory of strict product liability. However, the District Court specifically held that Respondent was not negligent. The finding of strict product liability was reversed by the Court of Appeals, and Respondent (CMC) was ordered dismissed as a party defendant. The appellate court found substantial evidence to support the trial court's conclusion of no negligence.

In reversing, the Court of Appeals held that the CMC winch was neither defective nor unreasonably dangerous. 497 F.2d at 79 (App., Pet. Writ, pp. 76-78). Important to this determination was the testimony which revealed that winches, and especially winches on shrimp boats, are practically never equipped with braking devices. It was testified that ninety to ninety-five percent of the market for shrimp boat winches is commanded by four makes, including CMC, and none of these winches have a separate brake on the winch cathead. In fact, there was no direct evidence of a winch with a brake on a shrimp boat.

Of the shrimpers who testified, the Petitioner had 41 years experience on shrimp boats. Robert N. Jenkins was a captain for 26 years on shrimp boats. Edward Terry had 15 to 20 years experience. Jerry Richo, the third crew member on the CIAPESC I at the time of the accident had 27 years of shrimping experience. All of these men were familiar with winches, similar to CMC's, and none had any brakes on the catheads. No one testified about any similar accident or injury.

All the crewmen on the CIAPESC I knew and appreciated how the winch worked. They knew the CMC winch lacked any brake. They knew it continued to turn several times after the power was dis-engaged.

Also relevant to the appellate court's holding are the facts that catheads are practically indispensable to the shrimping business and that the installation of a brake would substantially increase the cost of the winch.

Agreeing with the District Court, the Court of Appeals concluded that the cause of the accident and Petitioner's injuries was the action in turning on the power to the winch while Petitioner's hands were on the whipline and in close proximity to the cathead. The Court of Appeals further concluded that the lack of any brake was not the proximate cause of the injuries.

Depending on whether the Petitioner had ordered Terry to re-engage power to the winch, one or the other of the men misused the product. If Petitioner gave the order, the appellate court surmised, his assumption of the risk could be properly inferred based upon the relevant findings of the District Court. If he did not give the order, then Terry's unanticipated product misuse — he did intentionally engage power — could be inferred.

SUMMARY OF THE ARGUMENT

Most of Petitioner's allegations relate to issues not in this case. All of his allegations are without merit. None warrant the granting of a writ.

In relying upon the theory of strict product liability set out in the American Law Institute's *Restatement (Second) of Torts,* Sec. 402A (1965), the Court of Appeals was consistent with the few other courts of appeals that have considered claims of strict product liability in maritime cases. The opinion of the appellate court below is not in conflict with any decision by this Supreme Court or with any other court of appeals. In claiming that the lower court failed to apply federal maritime law, the Petitioner fails to demonstrate any substantive conflict between maritime law and the material holdings of the court below.

His complaint about the lower court's refusal to decide whether maritime law incorporates the theory of strict product liability is wholly lacking. The deferral of the decision for an appropriate case certainly does not conflict with the one other court of appeals which has acknowledged the incorporation.

No error is shown in the appellate court's holding that the CMC winch was neither defective nor unreasonably dangerous. Most of the cases cited are not in point, and none require any different result under maritime law.

Because Petitioner can show no error in the lower court's finding favorable to this Respondent on the defective condition issue, then his other allegations become academic. Foreseeability is an element of the theory of strict liability in defective design cases. It is a vital factor in measuring the magnitude of any risk for purposes of balancing any such magnitude against the utility of the risk.

The Court of Appeals correctly ruled against Petitioner on the causation issue. Respondent's winch didn't cause the accident. The accident was caused by the irresponsible conduct of either Petitioner Williams or Terry or both. This was a unique incident for which Respondent should not be held strictly liable.

Moreover, as the Court of Appeals notes, in addition to there being no showing of defective condition or of proximate causation, the evidence supported findings of Williams' assumption of the risk (if he gave the order) or unanticipated product misuse by Terry (if no such order were given). As previously stated, the misuse of the winch by Williams and/or Terry—turning on the power when the whipline was tangled on the winch and while Williams' hands were on the line and in close proximity to the winch cathead—caused the accident and the injuries.

With respect to Petitioner's claims concerning the lower court's holdings relevant to Terry and Brasea, the lower court correctly remanded the case for the District

Court to make a finding on whether Petitioner gave the alleged order to Terry to re-engage power to the winch. If Petitioner gave the order, then Terry and Brasea should not be held liable for negligence. If Petitioner did not, then Terry and Brasea were negligent.

Finally, since the District Court's finding of unseaworthy condition was specifically buttressed by its incorrect findings of defective condition of the CMC winch and the Bender installation of certain equipment, the Court of Appeals correctly set aside the unseaworthy condition finding.

REASONS FOR REFUSING TO GRANT THE WRIT

Respondent submits that review on writ of certiorari should not be granted. None of the issues promptly before this Court in this case warrant the granting of a writ. The reasons for refusing to grant the writ are many, and may be summarized as follows:

1. The decision of the Court of Appeals below is not in conflict with any decision of any other court of appeals.

2. The decision is not in conflict with any decision of this Supreme Court.

3. No important question of federal law is raised by the case which needs to be settled by this Court now.

4. The Court of Appeals has not decided any federal question in a way in conflict with applicable decisions of this Court.

5. No necessity has been shown to call for an exercise of this Court's power of supervision.

6. At best, the Petitioner has raised abstract questions of law the resolution of which will not alter the holdings of the Court of Appeals.

7. At best, Petitioner raises issues the resolution of which are of importance to the parties, but not significant to the public.

As to this Respondent, CMC, Petitioner asserts a number of propositions none of which are meritorious, or, at least, are material to the decision of this case. Respondent will respond to Petitioners argument by beginning first with the allegations relating to incorporation of the theory of strict product liability into federal maritime law. Next, Respondent will deal with the allegations relating to the law applied by the Court of Appeals to the strict product liability issues raised in the case. Then Respondent will discuss the soundness of the reversal by the Court of Appeals of the district court's holding respondent liable solely under the theory of strict product liability.

I

DETERMINATION OF THE QUESTION OF INCORPORATION OF STRICT PRODUCT LIABILITY INTO FEDERAL MARITIME LAW WAS UNNECESSARY, AND THE COURT OF APPEALS' DEFERRAL OF DETERMINATION OF THE QUESTION PRESENTS NO CONFLICT WITH ANY OTHER COURT OF APPEALS.

Immaterial to the resolution of this case, and certainly no ground for reversal, is Petitioner's complaint about the refusal of the Court of Appeals ". . . to consider the question of whether the law of strict product liability is now incorporated in the maritime law. . ." (Pet. for Writ, p. 16). To the contrary, the court considered the question, but thought it best to leave open the question of incorporation. 497 F.2d at 78 (App., Pet. for Writ, p. 74).

It would not have advanced Petitioner's cause if the Court of Appeals had acknowledged such an incorporation. Why? The reason is stated in that court's opinion: "[*E*]*ven if* products liability law is to be incorporated into our general maritime law, there can be no liability under the facts of this case." *Ibid.*

Petitioner's argument that the refusal of the Court of Appeals to consider the incorporation is in conflict with other decisions is totally without merit. As pointed out by the Court of Appeals, various district courts have split on the issue of incorporation, and only one Circuit Court has so far passed judgment on the issue—in favor of the incorporation. *Lindsay v. McDonnell Douglass Aircraft Corp.,* 460 F.2d 631 (8th Cir. 1972, 497 F.2d at 78 (App., Pet. Writ, p. 74). It goes without saying that the court's deferral of resolution of the question certainly presents no conflict with the affirmative holding in the *Lindsay case,* nor with any other case in which the issue has been considered.

Thus, the significant issues are whether the theory of strict product liability applied both by the Court of Appeals and the District Court is a correct one, assuming the viability of incorporation, and whether the Court of Appeals' application is correct.

II

IN RESORTING TO THE THEORY OF STRICT PRODUCT LIABILITY SET OUT IN THE *RESTATEMENT (SECOND) OF TORTS,* SEC. 402A, THE COURT OF APPEALS DID NOT FAIL OR REFUSE TO APPLY FEDERAL MARITIME LAW TO PETITIONER'S CLAIM AGAINST CONSTRUCTION MACHINERY COMPANY.

Petitioner argues that ". . . the Court of Appeals refused to apply federal maritime law in determining the legal rights and obligations governing Petitioner's claims against Bender and CMC. . ." (Pet. Writ, p. 14). Related is his attack on the validity of the lower court's application of the American Law Institute's *Restatement (Second) of Torts,* Sec. 402A (1965). (Pet. Writ, p. 14, pp. 19 et seq.).

The arguments put forth by Petitioner are without merit. Unquestionably, in its discussion of its reasons for holding CMC not liable in tort under the theory of strict product liability, the Court of Appeals relied upon the *Restatement of Torts 2d,* Sec. 402A, and the accompanying Commentary prepared by the American Law Institute. Just where is the error? What is that "federal maritime law" of strict product liability which Petitioner accuses the Court of Appeals of ignoring? Petitioner fails to reveal its substance or source.

There is no developed body of "federal maritime law" of strict product liability different from that stated in the *Restatement.* The only Circuit Court, the Eighth, which has specifically incorporated into federal maritime law the theory of strict product liability, *Lindsay v.*

McDonnell Douglas Aircraft Corp., 460 F.2d 631 (8th Cir. 1972), specifically applied the said *Restatement:*

> "We hold that the correct law to be applied to this case is expressed in Restatement (Second) of Torts § 402-A (1965), as it is the best expression of the doctrine as it is generally applied, and for the additional reason that several federal courts have previously used that section in maritime cases [cases cited]. *Lindsay,* 460 F.2d at 636.

One other Circuit appears to have applied the theory of strict product liability in a case within its admiralty jurisdiction. *McKee v. Brunswick Corp.,* 354 F.2d 577 (7th Cir. 1965). There the theory was applied to fix liability on the seller of the vessel for injuries to passengers. However, the Seventh Circuit did not purport to incorporate the theory into federal maritime law. Rather, the Seventh Circuit appears to have referred to Illinois law. Illinois had adopted the rules of strict liability in tort, without any requirement of privity between the manufacturer and/or seller and the user and/or consumer. *Suvada v. White Motor Company,* 32 Ill. 2d 612, 210 N.E.2d 182 (1965); McKee, 354 F.2d at 583. Interestingly enough, the Illinois Supreme Court had noted that the views expressed in Suvada coincided with the position taken in Section 402A of the *Restatement! McKee, supra.*

In holding that CMC and Bender were liable to the Petitioner on strict product liability grounds, the District Court used the language of the *Restatement* to state the legal theory (App., Pet. Writ, p. 44). Petitioner was satisfied with the application of the *Restatement* then.

In his briefs and argument before the Court of Appeals, Petitioner sought to uphold the decision of the District Court, relying upon his and the District Court's construction of the *Restatement*. Not until the Fifth Circuit construed the rule of the *Restatement* to exonerate CMC and Bender did Petitioner waver in his belief in that statement of the law. Now he attempts to discredit the *Restatement* by attempting to show that some state courts may have applied portions of the *Restatement* somewhat differently. Suffice it to say that Petitioner presents no different interpretation by any Circuit Court, or district court, on the liability issues presented in the instant case. Nor does Petitioner even present any relevant and differing interpretation applied by any state jurisdiction.

III

THE COURT OF APPEALS CORRECTLY HELD THAT THE WINCH OF CONSTRUCTION MACHINERY COMPANY, AS DESIGNED, WAS NEITHER DEFECTIVE NOR UNREASONABLY DANGEROUS.

A. The Theory of Strict Product Liability

The District Court found CMC not negligent. CMC was held liable to Petitioner solely upon the trial court's construction of the theory of strict product liability as stated in § 402A of the *Restatement*. In reversing the District Court, the Court of Appeals held that CMC did not breach any duty to Petitioner, in a strict product liability sense, and, even if so, CMC's winch was not the legal cause of Petitioner's injuries, in a strict product liability sense.

The CMC winch had no braking mechanism on either of the catheads. The Court of Appeals, in effect, found that CMC owed no duty to Petitioner to design any braking mechanism into its winch. In terms of the *Restatement*, the appellate court held that the winch was neither "defective" nor "unreasonably dangerous". 497 F.2d at 79 (App., Pet. Writ., pp. 77-78).

According to the theory of strict liability set forth in the *Restatement of Torts 2d*, Sec. 402A. . .

> "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, . . ."

The Court of Appeals observes that Section 402A sets out three requirements for strict liability—(1) the product must be "in a defective condition"; (2) it must be "unreasonably dangerous to the user"; and (3) it must be the "cause" of the injury. 497 F.2d at 78 (App., Pet. Writ, p. 74). When referring to the requirement of a defective condition, the usual situation involves a product which was not manufactured as intended. There was a miscarriage in the manufacturing process; it is an "impure" product. However, the instant case involves a winch which was manufactured just as it was designed or intended. Instead, the "defective condition" is alleged to be the design of the winch without a brake on the port cathead.

The Court of Appeals correctly notes that in these product design cases the phrase "defective condition" has no meaning independent from the requirement that the product also be "unreasonably dangerous". 497 F.2d at 79 (App. Pet. for Writ, p. 77). See, for example, *Ross v. Up-Right, Inc.,* 402 F.2d 943 (5th Cir. 1668); Wade, "Strict Tort Liability of Manufacturers", 19 S.W. L.J. 5, 15 (1965). The product is "defective" only because its design made it unreasonably dangerous to the user.

Stated generally, CMC had the duty to design, manufacture, and sell a winch the use of which is not unreasonably dangerous, or, to state it another way, a product at least reasonably safe to use.

The doctrine of strict liability does not require a perfectly safe or "fool-proof" product. Strict liability, by its terms, does not automatically apply just because use of the product entails some risk or danger. It applies only when use of the product is "unreasonably" dangerous. As the Court of Appeals had observed before, the requirement that the defect, to create liability, render the product unreasonably dangerous reflects a realization that many products have both utility and danger. *Helene Curtis Industries, Inc. v. Pruitt,* 385 F.2d 841 (5th Cir. 1967). In fact, it has been said that, in these defective design cases, the courts must balance the utility of the risk against the magnitude of the risk from use of the product to determine whether the use is unreasonably dangerous. *Pruitt;* Wade, *supra.*

To balance the utility and the magnitude of any relevant risk posed by the absence of an "adequate braking mechanism" on the port cathead, the risk must be defined. The risk is that which satisfaction of the duty (assuming such a duty) would have avoided. The risk with which we are concerned here was the risk of aggravation of an injury from an accident caused by the irresponsible conduct of Petitioner Williams and/or Seaman Terry in turning back on the power to the winch port cathead.

Should CMC be held liable for failing to anticipate and guard against the irresponsible individual conduct of Williams and Terry which merged to cause the accident? More specifically, did CMC have any duty to design to avoid enhancement of injuries caused by a unique "misuse" of its product? CMC emphatically replies "No." CMC had no reason to anticipate and to guard against the subject occurrence.

This being the only accident involving a shrimp boat winch in the evidence, obviously the magnitude of the risk was very slim, if not negligible. There is no evidence in the record of any frequency of occurrence of this sort of accident. Thus, this case is unique whereas, for example, automobile collisions and lawnmower accidents occur frequently.

What was the utility of the risk? It means a less expensive product, one less difficult to install, and one less difficult to use (R. 964-970). This type of winch, having no separate brake on the cathead, was common in the industry. Williams and his crew were familiar with this kind of winch and used it for many tasks. No brake was needed in order for the cathead to perform its intended functions—to pull in lines for anchors, for nets, for cargo.

After balancing the utility of the risk of aggravation with the slight degree of risk (one incident!), CMC contends the conclusion to be overwhelmingly in favor or utility. The winch was simply not "unreasonably dangerous" under the theory of strict product liability. Hence, such a duty (to add a separate brake to the catheads) should not be imposed.

Wade has set out a number of factors which he believes should be considered in making the determination of whether a product is unreasonably dangerous:

> "(1) The usefulness and desirability of the product.
> (2) The availability of other and safer products to meet the same need,
> (3) The likelihood of injury and its probable seriousness,
> (4) The obviousness of the danger,
> (5) Common knowledge and normal public expectation of the danger (particularly for established products),
> (6) The avoidability of injury by care in use of the product (including the effect of instructions or warnings), and
> (7) The ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive." Wade, *supra*, at 17.

After examining the record and the findings of the District Court, the Court of Appeals applied the foregoing factors or variables to the evidence and found:

> "Paraphrasing the variables suggested by Dean Wade, 19 S.W.L.J. at 17, we find the following in support of a 'cost outweighs benefit' conclusion here: (1) catheads are practically indispensable to the shrimping business; (2) few, if any, are equipped with a braking device, (3) the likelihood of injury

> is remote, limited to peculiar circumstances such as occurred in this unusual case; (4) the inherent danger is obvious to all; (5) injury could have been avoided but for the misuse of the product; and (6) installation of a brake would substantially increase the cost of the winch." 497 F.2d at 79 (App., Pet. Writ, pp. 77-78).

It is submitted that, in order to hold CMC liable for any of Williams' injuries, this Court must ignore the few limitations in the *Restatement* theory of strict product liability and make that additional "giant leap" to absolute liability in the broad area of products liability. To sustain Petitioner's claim against CMC, this Court would have to hold that product liability exists whenever an injury occurs or is enhanced in connection with the use of a product. No court, state or federal, has gone so far. Even Petitioner is reluctant to urge such a proposition. Petitioner couches his relevant arguments in terms of the assumed "defective" condition of CMC's winch.

B. Enhancement of Injuries

It is clear that the alleged defect, the absence of an "adequate braking mechanism", did not cause the accident. It was Williams' and/or Terry's conduct which caused the accident from which Williams' injuries stemmed. Instead, the trial court found the absence of an "adequate braking system" to be a producing cause of injuries to Williams. The "defect" enhanced or aggravated Williams' injuries. Even in the trial court's opinion, it was the return of power to the winch, causing the cathead to turn again, which caused the accident. With this return of power, Williams was caught in the line because his hands were too near the cathead.

Thus, this case falls into the category of the few cases in which the absence of a safety device allegedly aggravated or enhanced the plaintiff's injuries, rather than caused the accident.

With respect to this danger or risk of enhancement, reference should be made to Comment i of the *Restatement* which further clarifies the rule by explaining that, to be unreasonably dangerous, the product. . .

> ". . . must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."

As already pointed out, the relevant danger or risk, which is the focal point of the hypothetical cathead brake, was the enhancement or aggravation of injuries initiated by the conduct of a third party — i.e., Terry turning the power back on. Since everybody was aware the cathead had no separate brake, how can it be said that it posed a greater danger than that ". . . contemplated by the ordinary consumer [or user] . . . with the ordinary knowledge common to the community as to its characteristics? The Court of Appeals agrees. 497 F.2d at 79 (App., Pet. Writ, p. 77).

This aspect of the liability issue was recently similarly construed by the Tenth Circuit in a diversity case, *Hartman v. Miller Hydro Company,* 499 F.2d 191 (1974), in which the court applied the *Restatement* and cites Comment i thereto.

It has been held that recovery can be had under §402A where the lack of a proper safety device constitutes a defective design. *Larsen v. General Motors Corp.,* 391

F.2d 495 (8th Cir. 1968), Minnesota law applied; *Nanda v. Ford Motor Co.,* 509 F.2d 213 (7th Cir. 1974), Illinois law applied and *Larsen* followed. In these cases the crucial issue is whether the scope of the manufacturer's duty was broad enough to require him to provide the subject safety device.

In *Larsen,* the court held that in light of the well-known risk of automobile collisions an automobile manufacturer has the duty to design his cars so as to avoid unreasonable risks of harm to the user. Involved there was the claim that the improper placement of the steering assembly enhanced the driver's injuries in a collision.

In *Nanda,* the court held the manufacturer liable for injuries to passengers because of the absence of a fire wall between the passenger compartment and the gas tank. The court reasoned that because of the likelihood of rear-end collisions and consequent serious injuries to passengers, the manufacturer had a duty to install a fire wall.

There is a split of authority over the issue of whether the auto manufacturer must design to abate injuries from the "second collision". The leading case for the opposite view is *Evans v. General Motors Corp.,* 359 F.2d 822 (7th Cir. 1966), Indiana law applied. Involved in *Evans* was the plaintiff's claim that because of an "X" frame in the 1961 Chevrolet station wagon, instead of a perimeter or side frame, the collision of decedent's auto with another automobile allowed the left side to collapse in upon the decedent, inflicting fatal injuries. Observing that the manufacturer had no duty to make his cars accident proof, the Court exonerated the manufacturer by holding that his duty to design safely went no farther than to design so as to enable the automobile to function as a form of transportation. The duty did not include any requirement of designing so as to abate collision injuries. As a matter of law, collisions are not within the scope of an auto's intended use.

A recent case following *Evans* is that of *Turner v. Big Four Automotive Equipment Corp.*, 511 F.2d 133 (5th Cir. 1975), applying Mississippi law which disallows liability for enhancement.

Even *Larsen* does not support the district court's holding against CMC. The alleged "defective" condition, the placement of the steering assembly, was latent or hidden. The alleged defective condition here was open and obvious to all. Secondly, the steering design would function without the required extra effort of a man, but man's extra effort is required in the instant case. Someone would have had to apply the brake, if there had been one. The steering assembly in the Corvair was not located like those in other vehicles. Also, *Larsen* was decided on a negligence theory. In fact, the court expressly made no comment on the issue of strict liability or implied warranty of merchantability. *Larsen,* 391 F.2d at 506.

Finally and importantly, the Larsen court was confronted by a set of risks far greater in magnitude than that presented here concerning CMC's winch. The *Larsen* decision turns on the court's finding that the magnitude of the risk or involvement of the manufacturer's vehicle with other vehicles in injury-producing accidents broadens the automobile manufacturer's duty to provide a safe vehicle for its "intended use". See *Larsen,* at 502. Also significant is the emphasis placed by the court on the fact that injuries from automobile collisions ". . . are readily foreseeable as an incident to the normal and expected use of an automobile. . . Collisions with or without fault of the user are clearly foreseeable by the manufacturer and are statistically inevitable." *Ibid.* See also, *Nanda, supra.*

Obviously, the magnitude of the risk of injury prevalent in an automobile situation is not the same as that of CMC's winch. No evidence was produced of any injury to a seaman in the use of the winch cathead, such as happened to Williams.

C. Evidence of Available Safety Design

As found by the Court of Appeals, the evidence was clear that winches with brakes were non-existent on trawlers used by the shrimping industry. 497 F.2d at 79 (App., Pet. Writ, p. 76). In fact, there was no evidence in the record of similar winches having brakes on their catheads (R. 968-9). None of the witnesses were familiar with one on a shrimp boat (Jenkins, R. 567; Williams, R. 799; Koloc, R. 979; Richo Deposition 35; Bender, R. 1211).

Anthony R. Koloc, the sales engineer for CMC, called by the Plaintiff-Petitioner under the adverse party rule, testified about the practical design problems in adding some type of brake. (R. 848, 964, 969-970). No expert testimony was adduced to support the contention that the design was unreasonably dangerous.

The conclusion is inescapable that the trial court premised its conclusion of strict liability upon a mere concept with no supporting evidence as to practicality, as to design, as to cost, as to demand, etc. As the Court of Appeals concluded, the only evidence on these factors supports a legal conclusion of no duty to design and manufacture a brake on the cathead. The district court speculated and built inference on top of inference.

In the cases allowing recovery under the doctrine of strict liability upon a safety design defect theory, affirmative evidence was always produced of existing safer designs, usually along with affirmative expert testimony. *Larsen, supra; Nanda, supra.*

D. Strict Liability in Terms of Conduct

The terminology of the doctrine of strict liability characterizes the product rather than the defendant's conduct. But it has been observed that the issue can be phrased in terms of a defendant's conduct. *Pruitt,* 385 F.2d at 850; Wade, *supra;* Keeton, "Products Liability—Inadequacy of Information", 48 T.L.R. 398. First, assume that the defendant had knowledge of the risks involved in use of the product. Then, "for the design to be unreasonably dangerous, it must be so dangerous that a reasonable man would not sell the product if he knew the risks involved." *Pruitt, Id.;* Wade, *supra* at 10.

Again, applying the above test, the result should be the same here. Even from the advantage of hindsight, can it be said that, as a matter of law, CMC had a duty to provide a brake for the cathead? Discussed above are the considerations of utility of use of the winch which by far outweigh the incidental risk of enhancement of injuries from an accident caused by someone's misuse of the winch.

The only evidence produced by Plaintiff relevant to the degree of risk of enhanced injury in use of the winch cathead is that of his own accident. Isn't it strange that a design which has been used for years and years by countless numbers of people without serious harm is now condemned as unreasonably dangerous to life and limb?

Just because this accident happened is not sufficient justification for imposing a duty to anticipate the realization of what was a unique event.

E. Critique of Petitioner's Arguments on CMC's Duty

Arguing the existence of conflict between the decision by the lower court and decisions by other federal courts over the "correct" interpretation of Section 402A, *Restatement,* Petitioner fails to cite any federal cases in conflict. Again, there are only a few in the maritime field and none are in conflict with the decision here. *Lindsay, supra; McKee, supra.*

Relying exclusively upon a California case, Petitioner asserts that liability under Section 402A is not predicated on whether the product was "unreasonably dangerous", but, instead, is established "simply" by showing the product was "defective" and that the defect proximately caused the harm to a foreseeable user of the product. *Cronin v. J.B.E. Olson Corp.,* 501 P.2d 1153 (Cal. Sup. 1972). See Pet. for Writ, p. 22. Although the California Supreme Court has held that California law now requires proof only of a defective condition, as that court was quick to point out in *Cronin,* there remains the judicial task of applying the defectiveness standard to the facts of each case. 501 P.2d at 1162. In limiting a plaintiff's burden in a strict product liability case in California, the California Supreme Court by no means intended to make sellers and manufacturers liable for all injuries involving the use of its products. There remains ". . . the necessity of proving that there was a defect in the manufacture or design of the product and that such defect was a proximate cause of the injuries." 501 P.2d at 1162.

As it may relate to defective design cases, Keeton has criticized the *Cronin* opinion. Keeton, "Products Liability and the Meaning of Defect," 5 St. Mary's L. J. 30 (1972). For cases of defective design, Keeton argues that the term "unreasonably dangerous" helps to define the term "defect."

A second case cited by Petitioner in line with the *Cronin* case is an opinion by a New Jersey Superior Court, Law Division. *Glass v. Ford Motor Co.*, 304 A.2d 562 (N.J. Super., Law Div. 1973). The trial judge opined that the jury instruction should be on the defectiveness standard alone. However, the Supreme Court of New Jersey has not gone that far, having recently acknowledged the *Glass* opinion but reserving the issue. *Brody v. Overlook Hospital,* 66 N.J. 448, 332 A.2d 596 (1975).

No federal case is cited by Petitioner in which the plaintiff's burden has been restricted to a showing of defective condition only. Especially, there are no federal maritime cases on the point.

Assuming, *arguendo,* that only defective condition need be found, without an additional finding that the defect was unreasonably dangerous, nevertheless Petitioner's challenge to the Court of Appeals decision is without merit. Was the winch defective because it had no separate brake on the port cathead? The Court of Appeals specifically answered "No". 497 F.2d at 79 (App., Pet. Writ, p. 77).

Nowhere in his Petition for Writ does the Petitioner cite any affirmative authority for his proposition that the winch was defective. Among the cases cited in this portion of his argument (Pet. Writ, pp. 23-24), Petitioner cites another very recent opinion by the lower appellate court: *Weakley v. Fischbach & Moore, Inc.*, 515 F.2d 1260 (5th Cir. 1975). However, the court held in *Weakley* that the contractor had failed to establish a design defect in the subject electrical isolator switch.

The contractor attempted to show that the switch was defective because there were other design alternatives which, had they been adopted, would have prevented the accident or minimized its consequences. To that argument, the Fifth Circuit replied:

> "Such a showing, by itself, is insufficient to establish liability [authority cited]. It is one thing to show that the defendant might have designed a safer product; quite another to show that the product he did design was unreasonably dangerous. The defendant is not obligated to design the safest possible product, or one as safe as others make or a safer product than the one he has designed, so long as the design he has adopted is reasonably safe [authority cited]. *Weakley,* 515 F.2d at 1267.

Similar to the instant case, in *Weakley* the contractor produced no evidence that the design deviated from accepted industrial practice, nor did it produce any expert testimony to support its contention that the design was unreasonably dangerous, nor did it produce any evidence of previous accidents or previous switch failures. 515 F. 2d at 1268-1269. It is submitted that the reasoning in *Weakley,* if anything, bolsters this decision by the Court of Appeals.

The next case cited by Petitioner is a California opinion that was handed down by that state supreme court on the same day it announced its opinion in *Cronin, supra. Luque v. McLeon,* 501 P.2d 1163 (Cal. Sup. 1972). In *Luque* the user of a rotary lawnmower slipped on wet grass and fell backward. His hand slipped through the opening for ejecting cut grass and into the blade.

The sole issue on appeal in *Luque* was whether the defendant was entitled to an instruction on the plaintiff's awareness of the absence of a safety guard ower the opening.

The case is not in point on the duty issue. In fact, the court there notes that such an injury was foreseeable, that safety guards were available and would have cost the manufacturer about One Dollar to install. *Luque, supra.* While such injuries with rotary lawnmowers occur frequently, there is no evidence in our record of any similar accident with a winch on a shrimp boat in an industry many decades old. Further, there is no evidence of any other winches with brakes on shrimp boats, and there was uncontroverted evidence as to the substantial additional cost to be incurred in designing and installing such a hypothetical brake.

Neither in point is *Brown v. Quick Mix Co.,* 454 P.2d 205 (Wash. Sup. 1969). The case is also concerned with the effect of the plaintiff's awareness of the alleged defect. Interestingly, the plaintiff there testified that he wasn't aware of the particular danger. More importantly, the danger was the cause of the accident rather than the cause of enhancement of injuries resulting from any other cause, as here. In *Brown* the plaintiff's hand slipped between a centralizer pipe or tube and the flights of an auger inside the tube. Also, the accident occurred when product being used exactly as intended, unlike in our case.

Decided in *Messick v. General Motors Corp.*, 460 F.2d 485 (5th Cir. 1972) was the issue of whether the plaintiff had assumed the risk. There was no issue as to the defective and unreasonably dangerous condition of the product. No issue of defective and unreasonably dangerous condition of product was before the court in *Elder v. Crawley Book Machinery Co.*, 441 F.2d 771 (3rd Cir. 1971). At issue in *Walsh v. Miehle-Goss-Dexter, Inc.*, 378 F.2d 409 (3rd Cir. 1967) was the trial court's failure to properly instruct as to the standard of care to be exercised by workmen in cleaning moving machinery.

The *Powell* case cited by Petitioner is a negligence case. *Powell v. E. W. Bliss Co.*, 346 F. Supp. 819 (W.D. Mich. 1972). The court found that the manufacturer breached a duty to the operator of an industrial punch press. The machine continued to cycle after the power turned off due to flywheel momentum. To turn off the machine, the operator had to remove a safety device from her hand. The device was designed to keep the operator's hand out of the press area!

The accident in *Powell* occurred because of the machine's cycling coupled with an inadequately designed safety device which device was designed to meet an obvious and foreseeable danger. Further, there was evidence of realistic possibilities for a better flywheel brake, better guarding devices and some kind of effective warning to new operators of the nonobvious danger of continued cycling after power disconnect. *Powell, supra.*

Only one of the cases cited by Petitioner, at page 24, even involves the issue of defective condition unreasonably dangerous to user. *Rourke v. Garza*, 511 S.W.2d 331 (Tex. Civ. App. — Houston [1st Dist.] 1974, writ granted).[1] Involved in *Rourke* were scaffolding planks or boards delivered without 2″ x 4″ "cleats" on the ends to prevent horizontal or longitudinal slippage while in use on the scaffolds. The boards slipped and plaintiff fell through.

Distinguishing *Rourke* from the case at hand is the testimony in *Rourke* by the contractor-users of the scaffolding that it was customary in the geographic area (Galveston, Texas) for the boards to come from suppliers with "cleats". Also, they testified that it was common knowledge that it is dangerous to use the boards without "cleats". But they did. The employee was injured. And the effect to be given the contractor's knowledge is an issue in the appeal before the Texas Supreme Court. 18 Tex. Sup. Ct. Jr. 169 (Jan. 18, 1975).

Contrary to Petitioner's conclusion stated on page 24 of his Petition, the foregoing cases do not support the District Court's findings on strict product liability. Nor do they materially conflict with the opinion of the Court of Appeals. Simply put, Petitioner fails to show error in the Court of Appeals' determination that CMC's winch was neither defective nor unreasonably dangerous.

---

[1] It is not final. The *Rourke* case is presently pending on appeal before the Texas Supreme Court, the appeal involving, *inter alia,* the findings of defective condition unreasonably dangerous to plaintiff user. 18 Tex. Sup. Ct. Jr. 169 (Jan. 18, 1975).

IV.

THE COURT OF APPEALS CORRECTLY HELD THAT THE WINCH OF CONSTRUCTION MACHINERY COMPANY, AS DESIGNED, WAS NOT THE PROXIMATE CAUSE OF PETITIONER'S INJURIES.

A. Foreseeability of the Risk.

Having held that the winch design neither rendered the winch defective nor unreasonably dangerous to Petitioner the Court of Appeals proceeded to also find against Petitioner on the causation portion of the liability equation.

The Court of Appeals says that CMC occupies a position nearly identical to Bender. 497 F.2d at 79 (App., Pet. Writ, p. 78). In its discussion of the causation issue relevant to Bender's strict product liability, the Court concludes that the requisite foreseeability was lacking, citing its opinion in *Helene Curtis Industries, Inc. v. Pruitt*, 385 F.2d 841 (1967), wherein the court discusses the need, in abreaction cases, to balance the utility of the risk against the magnitude of the risk from use of a product. As the Fifth Circuit notes in its opinion here, the logic of *Helene Curtis* is applicable to cases of defective design.

Petitioner argues that "common law foreseeability has no place in the concept of strict product liability cases involving defective design". (Pet. for Writ, p. 24). In support of his proposition, Petitioner cites several Texas court cases, but only one federal court of appeals opinion: *Eshbach v. W. T. Grant's and Company*, 481 F.2d 940 (3rd Cir. 1973).

Far from ruling out foreseeability in defective design cases, the Third Circuit in *Eshbach* acknowledges the viability of "foreseeability" in defining the duty of the seller. 481 F.2d at 943. The seller is charged with ". . . foreseeing the probable results of the normal use of the product or a use which can be reasonably anticipated", citing its previous decision in *Kaczmarek v. Mesta Machine Company,* 463 F.2d 675 (3d Cir. 1972). 481 F.2d at 943.

Perhaps what misleads Petitioner about *Eshbach* is the fact that the court in *Eshbach* reversed and remanded the defendant's judgment because of certain contradictions it found in the district court's charge. The *Eshbach* court was of the opinion that the district court in its charge incorrectly implied that the seller's liability under the *Restatement* theory of strict tort liability hinged on the seller's having foreseen the precise manner in which the injury occurred. Although the charge also contained an accurate instruction as to the tort theory, the *Eshbach* court was concerned about the possible resulting jury confusion.

It is interesting to note that the Third Circuit qualifies its discussion of "foreseeable use" by pointing out that the concept does not include "unintended use". *Eshbach,* 481 F.2d at 943 (see footnote). This portion of the opinion is relevant to the instant case. Here, the Fifth Circuit postulates that the use of the winch when the injury occurred was not a foreseeable use. It was an unintended use. The winch was not intended to be powered when a line is tangled. Petitioner was injured because of the deliberate and intentional misuse of the winch. Irrespective of whether Petitioner gave the alleged order to Terry to engage the power, the fact is that the power was engaged intentionally by Terry. It was this act of Terry's which caused the accident in the opinions of both courts below.

Aside from *Eshbach,* Petitioner cites three Texas cases, two of which are inferior appellate court opinions [*Ethicon, Inc. v. Parten,* 520 S.W.2d 527 (Tex. Civ. App. —Houston [14th Dist.] 1975, no writ hist.); *Hartzell Propeller Co., Inc. v. Alexander,* 485 S.W.2d 943 (Tex. Civ. App.—Waco 1972, writ ref. n.r.e.)]; and only one of which is a state supreme court opinion which is not in point because it involved an impure product, one not manufactured as intended [*Hoover v. O.M. Franklin Serum Co.,* 444 S.W.2d 596 (Tex. Sup. 1969)].

Respondent submits that "foreseeability" of the injury is a necessary element in the theory of strict product liability as generally applied. Whether it be considered a part of the issue of scope of duty, or a part of the causation inquiry, it is a critical element in determining the magnitude of the risk in the use of a product. *Pruitt, supra;* Wade, *supra.* It is an especially critical element when the defect alleged is a design defect, moreover, a safety design intended to avoid enhancement of injury, rather than to avoid the accident itself.

B. Cause-in-fact.

More support appears in favor of the lower appellate court's holding of no legal causation when the facts as to the occurrence of the accident are reviewed. It is unclear from the record, and the district court made no finding, as to how long the cathead continued to turn under power after Williams became tangled in the line. Then only uncertain estimates were given as to how many turns it made after the power was disengaged.

The trial court's determination of causation was premised upon a bunch of inferences. If the cathead had had a brake and if someone had had the presence of mind to apply it and if the brake could have stopped the cathead sooner than it did on its own, then . . . If, if, if . . .

If there had been a brake, would Terry have applied it? He was the one who got out of the way when he saw what had happened. Would Williams have applied it? He was too busy trying to get his hand out of the rope to collect his thoughts to reach for and apply a brake. Would Richo have applied it? He was the most likely candidate. But he was at the back of the boat. If and when he applied a brake, would it have been soon enough?

It is CMC's contention that the trial court's finding that failure to provide an adequate brake caused enhancement of Williams' injuries was based entirely on a strained and speculative inferential chain of "ifs," but no facts. Thus, there is no showing of cause-in-fact, as a matter of law.

V.

EITHER PETITIONER'S CONDUCT CONSTITUTES ASSUMPTION OF THE RISK, OR SEAMAN TERRY'S CONDUCT CONSTITUTES MISUSE OF THE WINCH WHICH WAS THE INTERVENING CAUSE OF PETITIONER'S INJURIES.

Once again, the Petitioner fails to show any conflict between the Court of Appeals treatment of product misuse and assumption of the risk with that of any other court of appeals in a case involving maritime law.

Petitioner's argument at pages 25-27 of his Petition for Writ assumes a defective condition. But the Court of Appeals specifically found no defective condition and no causation. It is submitted that the Court of Appeal's product misuse findings should be treated as the sole independent and intervening legal causes of the accident and the injuries. No primary liability was established. Only Williams and/or Terry's misuse of the winch was established.

A. Petitioner's Assumption of the Risk.

As to the effect to be given Petitioner's assumption of risk (if he gave the order), Petitioner's argument is academic. It is academic because of the Court of Appeal's finding of no primary liability on the part of CMC or Bender.

In the view of the District Court, Petitioner's negligence was in the placement of his hands on the line and in close proximity to the winch. The District Court made no finding on whether Petitioner gave the alleged order to Terry to re-engage power (App., Pet. Writ, pp. 48-49). Terry was considered negligent for his failure to ascertain whether Williams' hands were a safe distance from the winch when he re-engaged power (App., Pet. Writ, p. 41).

The Court of Appeals held that the pivotal issue is whether the alleged order was given to re-engage power to the winch. If Petitioner, the master, gave the order, Terry was not negligent in obeying. If Petitioner did not, then Terry's negligence in re-engaging power was the intervening cause of the accident. In the latter case, Petitioner's positioning of his hands was not a contributing proximate cause of his injury. 497 F.2d at 73-74 (App., Pet. Writ, pp. 62-66).

Given the positioning of Petitioner's hands and assuming the direct order, such conduct does constitute assumption of the risk. Petitioner voluntarily encountered a known and appreciated danger. *Henrich v. Cutler Hammer Co.,* 460 F.2d 1325 (3rd Cir. 1972); *Texsun Feed Yards, Inc. v. Ralston Purina Company,* 447 F.2d 660 (5th Cir. 1971); *Elder v. Crawley Book Machinery Co.,* 441 F.2d 771 (3rd Cir. 1971); *Restatement (Second) of Torts,* § 402A, Comment n, at 356. In the *Elder* case, *supra,* it was pointed out that where a person who knows of the defect nevertheless chooses to use the product, the manufacturer's obligation to furnish a safe product has been waived by the consumer's choice to chance the danger involved in the defect.

In the *Henrich* case, *supra,* the plaintiff was injured while making an adjustment on a "slitter" machine. Contrary to instruction, plaintiff failed to disengage the power by throwing a power disconnect switch. One was on the machine and a second was located in the area proximate to the machine. Prior to the accident the slitter machine's electrical control system had been malfunctioning and was being serviced. Two co-workers were in the area. Plaintiff sued on a theory of strict liability.

From an adverse jury verdict, he appealed, arguing that he couldn't be held responsible for the danger the machine might be activated by human intervention or some defect. The court held that ". . . it was within the jury's province to find that plaintiff's knowledge of defects of the electrical control system, combined with his disregard of the instructions to disengage the power, amounted to a voluntary assumption of a known danger." 460 F.2d at 1326, 1327.

Within the context of federal maritime law, assumption of risk has been defined as follows:

> "A seaman to whom two ways were available, one dangerous and the other safe, assumed whatever risk was involved in taking the dangerous course when he selected it through his personal choice and not because of any compulsion or ignorance of the situation. *Johnson v. United States,* 74 F.2d 703, 704 (2d Cir. 1935)."

Hence, the definition of assumption of risk under federal maritime law is equivalent to the definition used by the cases in which § 402A has been applied. An unreasonable voluntary encounter plus knowledge of the defect constitutes assumption of risk.

Now, as to whether to treat assumption of risk as a bar to recovery or to apply comparative negligence, Petitioner cites no authority involving treatment of the defense in a maritime law case involving a claim of strict product liability. Notwithstanding, it should be kept in mind that nowhere in its opinion does the Court of Appeals hold that assumption of risk, or misuse, as defenses, are complete defenses in bar to recovery. Nor did the Court, for that matter, specifically consider them as justifying application of comparative negligence rules.

The fact of the matter is that the lower court holds that CMC—and Bender—was not liable to Petitioner in the first place. There was no primary liability to defeat by defenses of assumption of risk and misuse.

B. Terry's Unintended Misuse.

Turning to the matter of Terry's negligence, his conduct in re-engaging power constitutes misuse, mishandling or abnormal handling, which is a defense to strict product liability. In addition to the lower court, at least four other Circuits have so applied the *Restatement* in diversity cases: Fourth Circuit in *Brown v. General Motors Corp.*, 355 F.2d 814 (1966), cert. den. 386 U.S. 1036; Seventh Circuit in *Downey v. Moore's Time-Saving Equipment, Inc.*, 432 F.2d 1088 (1970); Eighth Circuit in *Schneider v. Chrysler Motors Corp.*, 401 F.2d 549 (1968); and Ninth Circuit in *Tomicich v. Western-Knapp Engineering Company*, 423 F.2d 410 (1970).

The Fifth Circuit has previously applied the *Restatement* rule on product misuse in *Messick v. General Motors Corp.*, 460 F.2d 485 (1972), *Ross v. Up-Right, Inc.*, 402 F.2d 943 (1968), *McDevitt v. Standard Oil Company of Texas*, 391 F.2d 364 (1968) and *Helene Curtis Industries, Inc. v. Pruitt, supra.*

Analogous is the Eighth Circuit opinion in *Leistra v. Bucyrus-Erie Company*, 443 F.2d 157 (1971). A negligence case, there the plaintiff and a co-worker were using the drum on a crawler-type crane for an unintended purpose. A steel cable used to raise and lower the load had spilled out beyond the confines of the drum, and had become wedged between the drum and an adjacent circular chain called the "power-down" chain which operates as a brake in controlling the downward movement of the load. After trying to dislodge the wedged cable by hand, the plaintiff resorted to using a crowbar. At this time the power to the drum was disengaged. Then the crane operator engaged power to move the drum back and forth. The power-down chain snapped and struck the plaintiff in the face causing his injuries. The drum and power-down unit were recessed in the cab, but unshielded.

The Court held that the legal cause of the plaintiff's injuries was the misuse of the product—turning the drum while the cable was wedged—and not the absence of a safety shield from the chain.

In *Tomicich, supra,* the plaintiff was trying to clean accumulation of mud from one of the sheaves running a conveyor belt. The Ninth Circuit affirmed summary judgment for the defendant. Important to its decision was the plaintiff's familiarity with moving equipment and the availability of safer ways to clean the sheave. CMC would submit that *Tomicich* is a well-reasoned authority for holding Williams' and Terry's misuse bars recovery against CMC.

The plaintiff's disregard of the known risk completely barred his recovery in *Downey, supra* [mechanical rug washer] and in *Brown, supra* [co-worker touched bulldozer starter motor, starting motor and bulldozer, while plaintiff was sitting on track with legs between track and the body].

The Eighth Circuit refused to discard the standard of strict liability and hold the manufacturer an insurer in *Schneider, supra.* The plaintiff injured his eye when looking through the side vent mirror of his car in the dark. The glass pierced his eye. Among other things that court held the plaintiff had misused the side mirror by using it for an unintended purpose.

When Terry deliberately turned the power back on, he and Williams were using the winch for an unintended purpose. Obviously, the winch cathead was not intended to run while a seaman attempts to untangle his line. This was misuse and such should bar any recovery against CMC. Such misuse was the independent cause of the injuries.

VI.

THE DECISION OF THE COURT OF APPEALS WITH RESPECT TO BENDER AND BRASEA IS CORRECT.

A. Bender.

Turning to Petitioner's contentions concerning the Court of Appeals decision as it appertains to Bender and Brasea, this Respondent submits that no material or relevant reasons have been offered by Petitioner which would warrant this Court's exercise of its writ power. Much of the above discussion on the relevant concepts of the law of strict product liability applies equally to Bender. The shortcomings and irrelevancies in Petitioner's argument as it applies to CMC also exist in his challenge of Bender's dismissal from the case.

B. Unseaworthy Condition.

With respect to his challenge of the court's opinion as it relates to Brasea and the claimed unseaworthy condition of the vessel, Petitioner again attempts to frame his argument by raising issues which are simply not in the case in its present posture. Petitioner asserts that the lower court failed to apply maritime law, that the lower court treated assumption of risk and intervening negligence as defenses in bar, and that the court violated the requirement of the "clearly erroneous" rule. Rule 52(a), Federal Rules of Civil Procedure.

To the contrary, the Court of Appeals, on motion for rehearing, merely amended its previous opinion by holding that Petitioner was not entitled to judgment *in rem* against the vessel. (App., Pet. Writ, p. 82). The *in rem* liability of the vessel was premised on the District Court's finding of unseaworthy condition. That finding, in turn, was specifically premised upon the District Court's finding of strict product liability against Bender and CMC. In the opinion of the District Court, it was the defective and unreasonably dangerous condition of CMC's winch and Bender's installation of certain equipment which caused the vessel to be unseaworthy (See footnote, App., Pet. Writ, pp. 81-82).

As the Court of Appeals reasoned, since it had exonerated both CMC and Bender of liability and held that neither CMC's winch nor Bender's installation of equipment created any defective and unreasonably dangerous condition(s), then there were no findings of the District Court left upon which to premise any finding of unseaworthy condition.

Petitioner offers absolutely no authority or reasoning to refute that conclusion. There are no conflicting decisions on the relevant issue of law. The court did not fail to apply maritime law. Petitioner is undone on this point by the limited specifics underlying the finding of unseaworthy condition in the District Court's opinion.

No issue of the treatment or effect of defenses is involved. There's no violation of the "clearly erroneous" rule. It is just that no unseaworthy condition exists, as a matter of law.

C. Terry's Conduct.

Another contention involving Brasea is that raised under the third portion of Petitioner's argument having to do with the effects of his and Terry's conduct (Pet. Writ, pp. 29 et seq). Basically, the Court of Appeals states that given the alleged order by Petitioner, Terry was only doing his duty and had no additional duty to ascertain, in the face of the order, whether Petitioner was in a position of safety. The master ordered him to engage the power and he did.

If Petitioner gave no such order, then Terry was negligent in engaging power to the winch.

Because the District Court was of the opinion that Terry was negligent irrespective of such an order, that court felt it unnecessary to find whether such an order was given. However, since in the view of the Court of Appeals Terry was not negligent if such an order was given, then a resolution of the narrow fact issue becomes crucial. The Court of Appeals did not shift any burden of proof from Brasea to Williams. Instead, it remanded for the District Court to make the additional finding required by the Court of Appeal's application of the maritime law to Terry's duty as a seaman.

CONCLUSION

Despite all of Petitioner's attempts at formulating issues that may appear significant, the real issues actually in this case on appeal are not so significant and only involve the parties. The material issues in the case would not appear to involve ". . . principles the settlement of which is of importance to the public as distinguished from that of the parties . . ."; nor does the case pose any ". . . real and embarrassing conflict of opinion and authority between the circuit courts of appeal . . ." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

All the seemingly significant issues argued by Petitioner are actually academic. They do not warrant this Court's review. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955).

Presented here is the Court of Appeal's holdings, as a matter of law, that CMC's winch was neither defective nor unreasonably dangerous, and that there was no legal causation.

The Fifth Circuit did not refuse to apply maritime law. No conflict of authorities is demonstrated by Petitioner. The issue about incorporation of strict product liability into maritime law is not only irrelevant to a decision of the case, but, moreover, untimely given the scarcity of consideration of the issue among the circuit courts.

For the reasons stated, Respondent, Construction Machinery Company, respectfully submits that the opinion of the Court of Appeals is in all respects correct, and that the Petition of Roy C. Williams for Writ of Certiorari should be refused.

Respectully submitted,

M. W. MEREDITH, JR.
FINLEY L. EDMONDS
Attorneys for Respondent,
Construction Machinery Company

Of Counsel:

MEREDITH & DONNELL
P. O. Drawer 2624
Corpus Christi, Texas 78403

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been deposited with the United States Postal Service, with proper first-class postage affixed thereto (in the case of Cleveland & Shaaber, air mail postage prepaid), certified mail, return receipt requested, addressed to each of the following counsel: J. Robert McKissick, Law Offices of William R. Edwards, P. O. Drawer 480, Corpus Christi, Texas 78403, and Cleveland & Shaaber, Barnett First National Bank Building, Jacksonville, Florida 32202, Attorneys for Petitioner Roy C. Williams; A. J. Watkins, Watkins & Marshall, 750 The Main Building, Houston, Texas 77002, attorney for Bender Welding & Machine Company, Inc.; and Mr. Charles D. Kennedy, Suite 3710, One Shell Plaza, Houston, Texas 77002 and Mr. Jack G. Carinhas, Jr., P. O. Box 71, Brownsville, Texas 78520, attorneys for Petitioner Brasea, Inc., on this ______ day of September, 1975.

M. W. MEREDITH, JR.
FINLEY L. EDMONDS
Attorneys for Respondent,
Construction Machinery Company